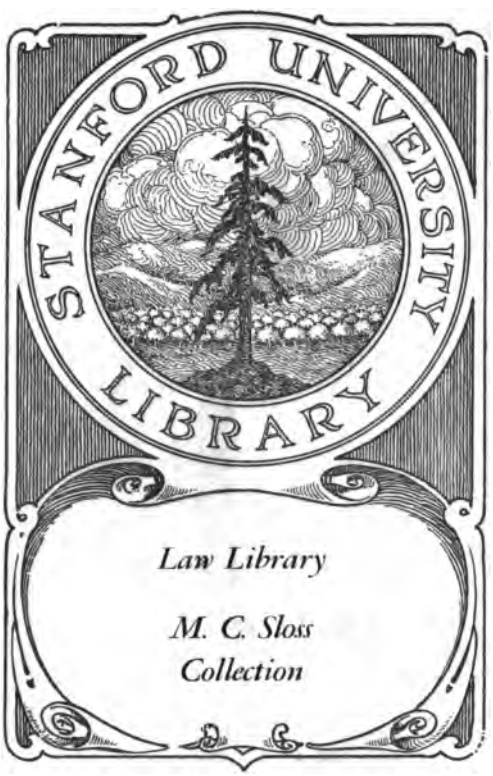
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THE SOUTH AUSTRALIAN LAW REPORTS.

REPORTS OF CASES

ARGUED AND DETERMINED

3056

IN THE

SUPREME COURT OF SOUTH AUSTRALIA.

EDITED BY

J. W. DOWNER,

A PRACTITIONER OF THE SUPREME COURT.

VOL. IV.—1870.

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1871.

JUDGES OF THE SUPREME COURT.

1870.

SIR RICHARD DAVIES HANSON . . . . . CHIEF JUSTICE.

EDWARD CASTRES GWYNNE, ESQ. . . . . SECOND JUDGE.

WILLIAM ALFRED WEARING, ESQ. . . . . THIRD JUDGE.

Primary Judge in Equity.

EDWARD CASTRES GWYNNE, ESQ.

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THE

SOUTH AUSTRALIAN LAW REPORTS.

1870.

SUPREME COURT.

GWYNNE, J., WEARING, J.] [COMMON LAW.

21 JULY, 2 SEPTEMBER, 1869, 10 MARCH, 1870.

MANDER AND ANOTHER v. HUTTON (ON BEHALF OF COMMISSIONER OF PUBLIC WORKS).

CLAIMANTS' RELIEF ACT, 1853.—*Port Wakefield Railway Act* 25 *of* 1866-7—*Act* 11 *of* 1859.

The Port Wakefield Railway Act, 25 *of* 1866, *empowered the Commissioner of Railways to construct a certain Railway. By Act* 11 *of* 1859, *the Commissioner of Public Works for the time being is Commissioner of Railways.*

In this case the Government, against whom this action was brought, had asked for tenders for certain work on the Port Wakefield Railway; and the contract, under which the plaintiffs had done the work sued for, had been prepared by the Government, but never actually executed by them. In form it was made by the Commissioner of Public Works, on behalf of the Government, had been acted upon by the Government as if executed, and had been signed by the contractors and their bondsmen. The specifications under which the plaintiffs worked had been supplied by the Government.

It being contended that the Government could not enter into or be bound by the contract, the Act directing the Commissioner of Railways and not the Government to make the Railway.

Held—*That the defendant was liable.*

THIS was an action under the Claimants' Relief Act, No. 6 of 1853, brought by contractors on an alleged contract between themselves and the Government. The contract, as set out in the

declaration, was one whereby the Government employed the plaintiffs to construct certain works upon the Port Wakefield and Hoyle's Plains line of railway. Upon the trial before GWYNNE, J., at the June 1869 Civil Sittings, evidence was given which showed that although the written contract had never been signed by the Commissioner of Railways, yet it had been prepared by the Government, signed by the contractors' bondsmen, and had subsequently been acted upon and recognised by the Government. The specifications were produced, and also a set of "General Conditions for the execution of all Government works," from the custody of the Government when the contract was asked for. The agreement set out that the contract was made between the plaintiffs and the Commissioner of Public Works on behalf of the Government. The Judge directed a verdict to be entered for the defendant, on the ground that no action would lie against the Government for the breach of such contract, and that the action must be against the Commissioner of Railways or some one representing him.

21 July—

Stow, Q.C., moved for a rule to set aside the verdict.—Although an Act has been passed giving the Commissioner of Public Works power to construct a particular railway from Port Wakefield to Hoyle's Plains out of funds to be provided by bonds, that did not prevent the Government from contracting in its own name for the construction of the works referred to in the Act; and if the Commissioner of Public Works entered into a contract on behalf of the Government they could not repudiate his acts. Even if entered into by him as Commissioner of Railways, an action would lie against the Government, or else contractors were remediless, because there was no provision in the Act that the Commissioner of Railways might sue or be sued either personally or by his Secretary. Even if there were, that would be only an alternative, as the Government were the ultimate principals, and therefore liable—

The Queen v. *McCann*, L.R., 3 Q.B. 677.

A *rule nisi* being granted,

2 September—

The Attorney-General *(Strangways)* showed cause.—The Port Wakefield Railway Act, No. 25 of 1866-7, conferred a statutory power upon a particular officer appointed to carry out the work—the Commissioner of Railways. The Legislature has provided funds to pay for it from a particular source, and it has already been held in a decision of the Court that the Commissioner might sue and be sued by his Secretary. All they had to show was that this was not "a case of dispute or difference touching any pecuniary claim between any subject of Her Majesty and the Colonial Government of South Australia;" and neither the bond nor the evidence showed that the contractors had made any agreement with the Government, or that the Government were concerned in the construction of the railway. Nothing has been done under the Act in any way in opposition to the powers conferred upon the Commissioner of Railways. The Commissioner of Railways, under the authority of Act No. 11 of 1859, and the decision of the court in *Hutton* v. *Hill* was in precisely the same position in respect of suing and being sued, making contracts, and entering into agreements, as the Railway Commissioners were under the Act of 1855-6. The only ground for connecting the Government with the Commissioner of Railways was the provision in the Act that "the Commissioner of Public Works for the time being shall be Commissioner of Railways." But those duties were entirely distinct, and had no relation to the Government. The Act made the Commissioner of Public Works Commissioner of Railways, but he was not a member of the Government by virtue of being Commissioner of Railways, but through being Commissioner of Public Works. To hold the defendant liable would decide that funds appropriated by Parliament for a specific purpose need not be so applied, but a simple refusal to make a proper appropriation by the officer entrusted with the duty would enable the General Revenue to be appropriated to purposes which the Legislature never contemplated nor authorized—

Addison v. *Mayor, &c., Borough of Preston*, 12 C.B., 108 and 133

Tobin v. *The Queen*, 16 C.B., N.S., 347.

Boucaut followed on the same side, and cited

Bush v. *Martin*, 33 L.J., Exch., 17
Hall v. *Taylor*, B. & E., 107.

Stow, Q.C., in support of the rule.—Although no written contract was signed by the Government, the agreement itself, the bond, and the general conditions proved on the face of them that the contract was entered into by the Commissioner of Public Works on behalf of the "Colonial Government." The evidence proved that the document was prepared by the Government, and recognised on their behalf by the Commissioner of Public Works, who did not profess to make the contract by the title of the Commissioner of Railways. It was no answer to say that the Commissioner had not authority to enter into the contract. He was one of the highest public officers recognised by statute, represented the Government in all matters affecting public works, and was held out as an officer with whom contractors were to deal with on the faith that he was authorized to enter into contracts for the Government. The Commissioner was not compelled by the Act to construct the Port Wakefield Railway out of any specific funds; he had power to apply public money for its construction, and there was nothing to show that the funds voted for public works had been expended, or that there was any difficulty in paying for it out of funds provided by Parliament; yet, if the Commissioner entered into a contract for the Government, for their advantage, was it to be said they were not liable? There was no remedy unless against them. The contract was for their benefit, and even if the Commissioner of Railways could have been sued, there would be a concurrent remedy against the Government. The Commissioner had no power of suing or being sued, under Act 25 of 1866-67, which Act merely conferred a statutory power upon him to carry out the work by means of public money, but no interest vested in him. The money for its construction was not placed under his control; but like other loans, was simply made use of by means of bonds as a matter of convenience in the Treasury, and the Treasurer had the sole control over it—

Churchward v. *Queen*, 1 L.R., Q.B., 173

The Mersey Docks v. *Gibbs*, 1 L.R., H.L., 93
Story on Agency, s, 302
Gidley v. *Lord Palmerston*, 3 B. & B., 275
Macbeath v. *Haldinand*, 1 T.R., 172
Unwin v. *Wolseley*, 1 T.R., 674
Tobin v. *The Queen*, 16 C.B., N.S., 310
Allen v. *Hayward*, 7 Q.B., 960
Lloyd v. *the District Council of Encounter Bay*, 1 S.A.L.R. 121.

Brook followed on the same side.—The contract was entered into with the Commissioner of Public Works, and both parties have acted on the assumption that there was an express contract. Although under the Act of 1855-6 the Railway Commissioners had the power of suing and being sued, under the Port Wakefield and Hoyle's Plains Railway Act the Commissioner could not be sued either personally or by his Secretary, and that being so, to whom were they to look? The Commissioner of Railways and the Commissioner of Public Works had no separate existence, and it could not be said that the former ceased to be a representative of the Government in the carrying out of this work. There was no special fund provided for the construction of the railway—it was all charged upon the General Revenue and paid for out of it, and the 22nd clause of Act 25 of 1866 provides for certain improvements at Port Wakefield being made from the same fund. As the whole proceeds of the line went into the hands of the Treasurer, the Government were solely liable, and the relations which existed between the Commissioner of Railways and the Government were simply that of agent and principal.

Cur. ad. vult.

10 March, 1870—

The judgment of the Court was now delivered by GWYNNE, J.—The plaintiff was nonsuited upon the grounds that the proceedings under the Claimants' Relief Act were not appropriate to the circumstances of the case. It appeared to me upon the trial that the work for which the contract was made was not a work belonging to the Crown, but was managed under an Act of Parliament, which

made the Commissioner of Public Works the person amenable, and it appeared then to me that there was no privacy between the Commissioner and the contractors so as to make the Claimants' Relief Act applicable. We had an opportunity of listening to a very able argument by *Mr. Stow* upon the subject, and we have come to the conclusion that the nonsuit was wrong, and therefore must be set aside. If a more elaborate judgment is required we will give one, but it is so simple a point that I scarcely think it necessary to say more than that it was substantially a work undertaken on behalf of the Crown.

Nonsuit set aside.

GWYNNE, J., WEARING, J.] [COMMON LAW.

8 AND 10 MARCH, 1870.

WARREN (APPELLANT) v. HOWSON (RESPONDENT).

DESTITUTE PERSONS RELIEF ACT, 1866-7.—*Illegitimate child—Proof of paternity.*

The evidence of paternity required under Act 12 *of* 1866-7, *s.* 14, *in corroboration of that of the mother, must be of circumstances which happened about the time of the intimacy which led to the birth of the child.*

This was a case stated by the Local Court of Adelaide for the opinion of the Supreme Court on an appeal from a decision of Mr. Beddome, S.M., adjudging the appellant the father of an illegitimate child.

The question was whether there was any evidence against the appellant in addition to that of the respondent.

The information had been heard on 28th April, 1869, when the complainant deposed that in April, 1868, she was housemaid at the Globe Hotel; that the defendant had on several previous occasions

when he stayed there committed acts of familiarity with her; and that in April, 1868, they had intercourse which led to the birth of the child on the 13th January, 1869; and she referred to one occasion in April when the defendant entered her room while the barmaid was present. The barmaid, whose evidence was relied on in corroboration, stated that she saw no familiarities in April, but that in September the appellant went into the room occupied by herself and the respondent, when the respondent ordered him out; that in the same month she went to the appellant's room and called the respondent, when the light in the room was suddenly put out and the respondent came from a room adjoining the appellant's; that she in the same month saw the appellant kiss and pull the respondent about. S. 14 of 1866-7 provides that "no man shall be taken to be the father of an illegitimate child upon the oath of the mother only."

J. Downer for the appellant.—The finding was wrong, there being no evidence but that of the mother. In the first place, the Act provides that no one shall be taken to be the father, &c., on the oath of the mother only—that is, on the oath of the mother only that he is the father. This is the only grammatical construction. The English Act requires corroborative but ours direct evidence. But, secondly, were our Act the same, there was no evidence. The mother was contradicted, not corroborated. The child was born in January. The mother swore that the circumstances which she could have corroborated happened in April, the time of the intimacy; but her witness spoke to September, not to April. The additional evidence must be such as would independently of the mother establish a *primâ facie* case; but this was quite inconsistent with the appellant being the father, seeing that the child was born in January, and therefore the intimacy must have been long before September.

Stow, Q.C., for respondent.—It is impossible to obtain other evidence than that of the mother as to the commission of the act, and the evidence required is just that which would render it probable that the statement of the mother is true. The only question is whether there was any corroborative evidence what-

ever, and if there was, it was for the Magistrate to decide whether it was sufficient or not—

Lawrence v. *Ingmire*, 20 L.T., N.S., 391
The Queen v. *Pearcy*, 16 Jurist, 193.

Circumstances happening after the intimacy must be considered as well as those before, and here the evidence of the barmaid clearly showed considerable familiarities between the parties.

Downer, in reply, pointed out that in *Reg.* v. *Pearcy* the familiarities corroborated were about the time of the alleged intercourse.

Cur. ad. vult.

10 March—

GWYNNE, J., after reviewing the facts and the difference between the Imperial Act 7 & 8 Vict., c. 101, sec. 3, and the Local Act No. 12 of 1866-7, said—Undoubtedly it is very difficult to put a construction upon the Local Act. What the Legislature contemplated beyond the oath of the mother it is difficult to say. *Mr. Downer* contended that other evidence must show a *primâ facie* and independent case. I don't say it is not so, and it is not necessary on the present occasion to put any construction upon the words. I only draw attention to their vagueness, and wish that our own Legislature in their wisdom might see proper to assimilate their Act to the English one, because then we should have the full benefit of the English decisions, which at present do not serve us so effectually. It has been held on the construction of the English Act that though corroborative evidence must exist, its degree is altogether a question for the Justices. It is to be corroborative testimony to their satisfaction, and if the evidence is capable of that and they are satisfied, their decision would be conclusive. If it was not capable of corroboration, then the order would be set aside. Those are the decisions under the English Act—*Regina* v. *Pearcy*, 16 Jurist, Q.B., 193; *Lawrence* v. *Ingmire*, Law Times 1869, Q.B., 391. Now, it appears in this case that the woman says that the first intimacy took place about the 19th of April,

1868, and the child was born on either the 13th or 15th of January, which would be consistent with the ordinary course of nature. That was her testimony, which is clearly that Warren was the father of the child. Then by way of confirmation Miss Connor was called, and her evidence is consistent with the informant's on three points; but she fixed the time in September when, according to the woman's own evidence she would have been about five months gone with child, and she has good reason for remembering the date, because she says a marriage took place in her family in that month, and this was the Sunday before the marriage. Well, she says that in September he went to her room and that he was turned out, and she says that upon another occasion, also in September, she went to call the informant in his bedroom and saw a light under the door, but that when she called the light suddenly went out, and presently the informant came, not out of Warren's room, but out of some other room. Therefore, it appears she did not see her in Warren's room, but she had her suspicions, and I won't say they were ill grounded. Then she says also that she saw Warren kiss and pull the informant about, and that was also in September. Now, if these items of corroboration referred to April I should be very sorry to say they would not be such proof as according to the English law would corroborate the evidence of the informant, but instead of this happening in April it happened in September, and I don't think it corroborates the informant's testimony one iota.

WEARING, J., concurred.

Order reversed.

21 MARCH, 1870.

SOUTH AUSTRALIAN BANKING COMPANY v. HORNER AND OTHERS.

The Primary Judge has power to grant a rehearing of cases decided by the Full Court before his appointment. On motion for rehearing objection cannot be made that the decree was by consent, except such consent appearson the face of the decree.

THIS was a petition for rehearing. The facts and arguments appear sufficiently from the judgment of the Primary Judge.

GWYNNE, J.—In this case the defendants filed a petition for a rehearing. The petition was signed by counsel in the usual manner, and came on for hearing, when it was objected that there was an application to take the petition off the file for irregularity, which should be disposed of before the petition for rehearing. The grounds against the petition were:—First, that the Primary Judge has no power to review a decree made by the Full Court before the appointment of the Primary Judge; second, that the decree in respect of which the rehearing was prayed was by the consent of the parties; and another minor point, that there had been an enquiry directed and made by the Master. As to the first point, it appears to me that whether the rehearing was upon a decree pronounced by the Full Court, or one made by the Primary Judge, the same law would apply; because if the Primary Judge could not rehear cases decided by the Full Court, the party vexed by error in that decree would be without relief, because since the appointment of the Primary Judge the Full Court, which used to exercise an equitable jurisdiction, had given up its power to do so, and become simply in equity a Court of Appellate Jurisdiction. With regard to the second point, I find, on looking at the decree, that there is no indication of consent whatever. The decree informs me that the case came on for debate, was duly heard, and the Court after due deliberation made a decree. I am disposed to think in that case, even if there was an affidavit most strong and explicit, the Court would not listen to it to contradict the record. But it is unnecessary to decide that, because in this instance no consent whatever is shown. As to enquiry having been made, that, I apprehend, is a matter for the

Court. If enquiry involving great expense had been carried on, or if enquiry was unnecessary, perhaps the Court might interfere; but what has taken place here was of a very simple nature, and might have been done in a few hours, because the bill and answer seems to confess that there was a large amount due. Therefore I think the motion to take the petition off the file must be dismissed, and with costs.

Rehearing granted.

GWYNNE, J., WEARING, J.] [COMMON LAW.

22 MARCH, 1870.

NIMMO V. PETERS.

LOCAL COURTS.—Jurisdiction—Prohibition.

In a contract for certain work at £150, to be performed in two weeks from date, it was provided that payments of £15 a week should be made during the progress of the work. On action in the Local Court of Adelaide for £60, balance due on the contract, it appeared that six weekly payments had been made, and on this it was contended by the defendants that the Court had no jurisdiction, because the claim had not been reduced by payment to an amount within its jurisdiction. On motion for prohibition,

Held—*That the amount had been reduced by payment, and the Court had jurisdiction.*

THE action was brought for £60, balance of a building contract for £150, which was to be paid in weekly instalments of £15, the work to be finished within a fortnight. The work had not been completed in a fortnight, but six weekly payments had been made. On the part of the defendant, it was contended that the sum claimed was above the jurisdiction of the Local Court, and the question was whether the £90 was part payment on account of the contract so as to reduce the amount within the jurisdiction of the Court.

A rule *nisi* for a writ of prohibition having been obtained,

Ingleby and *J. Downer* showed cause, contending that the £90 was either payment or reduction, in either of which cases the Court had jurisdiction—if payment, under the very words of the Local Courts Act; and if reduction, then the only amount to which the plaintiff became entitled when he finished his work was the £60 claimed; and on action for the full amount £150, the defendant could have proved the reduction under the general issue, and without plea of payment—

Day v. *Sollett*, 4 Burrowes, 2133
Ricardo v. *Maidenhead Company*, 27 L.J., N.C., 75
Joseph v. *Henry*, 1 L.M. and P., 388
Chitty on Pleading, 568.

Stow, Q.C., in reply, contended that the £90 received by the defendant were not payments but matter of set-off, and therefore did not reduce the claim so as to give the Local Court jurisdiction. He cited

Avard v. *Rhodes*, 8 Ex., 317
Isaacs v. *Wylde*, 7 Ex., 163
Woodhams v. *Newman*, 7 C.B., 664.

Per Curiam.—The £90 was payment, and the Court had jurisdiction.

Rule discharged with costs.

GWYNNE, J., PRIMARY JUDGE.] [EQUITY.

8 APRIL, 1870.

JONES v. JONES.

Where land had been conveyed to partners as tenants in common, but had been paid for out of partnership moneys and used for partnership purposes, it was held to be partnership property and treated as personalty.

THIS was a suit for the purpose of deciding a question relative to the title of a portion of the estate of the late Thomas Jones, who,

with his brother Andrew Jones, for some years carried on business as general dealer. Proceedings were originally commenced by summons, but His Honor thought it was necessary there should be a bill for him to decide the rights of the parties. The case came on upon bill and answers of the defendants—Andrew Jones, Elizabeth Elliot, and Andrew Thomas Jones. Thomas Jones died in February, 1862, and letters of administration were granted to his wife, now Mrs. Elliot, on the 25th July, 1862. The litigation commenced by a summons against the personal representative, upon which the usual accounts were ordered to be taken on the 2nd of October, 1863. The infant heir-at-law, Andrew Thomas Jones, filed a bill claiming the real estate that belonged to his father, and prayed that it might be ascertained to what freehold lands he was entitled, and accounts taken of the rents and profits attaching thereto. A reference to the Master was ordered on the 15th December, 1864; the Master reported as to the rights of the infant heir-at-law on the 8th of March, 1865. The only question was with regard to several lots of land, being portion of Town Acres (Adelaide), 177, Waymouth street; 194, corner of Waymouth and Morphett streets, on which is erected shop aud store; and 134, Currie street; besides one or two allotments of less value at Port Adelaide. The prayer of the bill was that the said shop and premises, and other land might be declared to form part of the assets of the late partnership, and disposed of in due course as part of the personal estate of Thomas Jones, deceased.

GWYNNE, J., said he supposed the question would be with regard to the *jus accrescendi*, as between the personal representative of the deceased and the heir-at-law, and as to what was partnership property and what was not.

Belt for plaintiffs.

Lindley's Law of Partnership, 565
Darby v. *Darby*, 3 Drewry, 495
Dale v. *Hamilton*, 5 Ha., 369

show, that although the property is limited to partners as tenants

in common, still if it be used for partnership purposes it will be treated as partnership property. He read portions of the answers on which he relied as showing that the property in Waymouth street had been purchased with partnership funds and used for partnership purposes.

Fenn for infant heir-at-law.—The land may be divided into two classes; that which had been conveyed to Thomas Jones and Andrew Jones as tenants in common, and that which was vested in them as joint tenants. Firstly, the lands vested in them as tenants in common, were not affected by the partnership; and secondly, the purchase of joint property for the partnership did not affect the nature of the estate. The lands being conveyed to the Jones's as tenants in common, one being dead the land would vest in Andrew Jones and Andrew Thomas Jones, by operation of law. The only question was whether there was anything *dehors* the deed to show that the land should vest otherwise. The question was not whether there was not a *jus accrescendi*, but whether this was real or personal estate. In the case of *Darby* v. *Darby*, the subject-matter was a joint adventure in land and therefore had no application; and *Dale* v. *Hamilton* referred to leasehold, and the decision proceeded almost entirely on the Statute of Frauds. Therefore neither of them bore upon the present issue. See

Thornton v. *Dixon*, 3 Bro. C.C., 199
Steward v. *Blakeway*, L.R., 6 E., 479.

It is said in Lindley, 569:—"Where land belongs to all the partners as tenants in common but not as partners, and the land is used by them for partnership purposes, but is nevertheless intended to remain vested in them as tenants in common, and not to form part of the assets of the firm, the share of each partner will be real and not personal estate."

GWYNNE, J., apprehended that decision was on the ground that the land was not auxiliary to the trade; but where land was bought for the purposes of joint trade and was used as such, it was naturally to be concluded that it was auxiliary to the trade,

and then he thought the limitation would be quite immaterial. Allotments portions of Town Acres 177, 194, having been used for the purposes of the business were partnership property, and must be treated as personalty; the allotment on Acre 134, in Currie street, vested in the heir-at-law.

GWYNNE, J., PRIMARY JUDGE.] [EQUITY.

4 AND 25 APRIL, 1870.

ENGLAND AND OTHERS v. HAYNES AND OTHERS (LATE COULTHARD).

PRIMARY JUDGE—Rehearing.

The Primary Judge has power to grant a rehearing, whether decree were made before or after his appointment.

In an administration suit the executor claimed to be a creditor on the estate against the general devisee, and the evidence in support of his claim was his own affidavit that the testator was, at the time of his death, indebted to me in the sum of £1,400 *and upwards, and that a large portion of the said debt still remains due and owing to me, and an affidavit of F., who stated that he had been Solicitor for the testator, who had admitted to him that he owed the debt claimed.*

The defendant, the widow of the testator, denied the debt.

The proof of the will rested on the plaintiff's affidavit as to its execution and contents.

Held.—Firstly—*That the affidavit of F. in support of the debt was not receivable, the admission having been made to him by the deceased as his Solicitor. That the case then resting on the affidavit of the plaintiff, the rule in Equity is that the unsupported testimony of any person on his own behalf cannot be safely acted upon, and that the plaintiff had therefore not sufficiently proved his debt.*

Secondly—*That the will was not sufficiently proved; the proper evidence being the probate under Act* 6 *of* 1860, *s.* 32, *or the production of the will by the officer in whose custody it would be.*

THIS was an administration suit, a bill having been filed by Mr. John England, the executor of the deceased, Wm. Robson Coulthard, who claimed to be a creditor on the estate against the general devisee. It had been heard before the three Judges on the

15th April, 1867, and a decree was made referring it to the Master to enquire what amount, if any, was due to the plaintiff, reserving to the defendant any right which she might have under the Statute of Limitations, to be made available before the Master on the enquiry.

Belt for the plaintiff.—The plaintiff claims that there was a debt owing to him of £1,400, and alleges that the personal property of the testator was insufficient to meet the claims of his creditors. The real estate was devised to Emma Coulthard, the testator's wife (since married), subject to the payment of his debts. One of the affidavits (that of Mr. Fenn, who was at one time solicitor to the deceased Coulthard) states that he has admitted he was indebted to the plaintiff in a large sum of money, and that it was his intention to pay the same out of a legacy of £1,000 by the will of his father in England. He quoted

Rowley v. *Adams*, 2 H.L. Cas., 725,

and contended that if the defendants were dissatisfied with the decree they ought to have objected immediately, and not lie by for three years and then come and endeavour to upset it.

Baker followed.—As the case had been argued before the Supreme Court, His Honor had no power to rehear it. The point had been decided in the contrary way, and therefore he should not argue it, though he wished to take it. The cases on the subject involved in this suit, would be found divided into two classes—those in which the question was strictly a legal one—as in a bill of exchange, in which case it would be referred to a jury; and matters of account, which would be referred to the Master. In this case there was most conclusive evidence, which was not contradicted except by the affidavit of one person (Emma Coulthard), of there being a debt due.

Stow, Q.C., and *Brook*, for the defendants.—The motion for a decree should be refused, and the Court should exercise the discretion which it has to dismiss the bill. The first ground was that the plaintiff had not set out facts on which the Court could come

to a conclusion of law, having stated merely that the testator was indebted to him £1,450 upon balance of account. Another objection was that there was no allegation that the personal estate was not sufficient to satisfy the plaintiff's debt, and therefore, in the absence of such an allegation, the Court would not make it a charge on the real estate. The affidavit of Mr. Fenn could not be used, and Mrs. Coulthard in her affidavit swore that there was no debt due. The law was clearly laid down that the Equity Court had no original jurisdiction over the debt, and where there was a conflict would not assume those functions which belonged to a Judge and Jury, but would tell the party that he must establish his debt at Common Law—

Watson v. *Parker*, 2 Ph., 8
Woodgate v. *Field*, 2 Hare, 211.

The personal as well as the real estate ought to be represented, but the plaintiff being the executor he occupied two hostile characters, and while he sued as a creditor could not properly represent or defend the estate. It was quite clear the debt must be proved before anything else could be done.

Belt, in reply.—It would be unjust that the bill should be now dismissed, and so give the defendant the advantage of three years' grace to plead the Statute of Frauds—

Seton on Decrees, 137.

Cur. ad. vult.

25 April, 1870—

GWYNNE, J., delivered judgment as follows:—This case came on in the Supreme Court on the 16th of April, 1867, before the Full Court (before the appointment of the Primary Judge) on a motion for a decree, when the usual decretal order in an administration suit was made. The defendants, feeling themselves aggrieved by that decree, now bring the case on for a rehearing. On the part of the plaintiff it was submitted that the Primary Judge does not possess the power of rehearing a case,

even if originally heard before himself, but certainly not when the cause was heard before the Supreme Court, as this was, anterior to the appointment of the Primary Judge. In considering the questions thus raised, it is well to consider what is the nature and object of rehearings in Equity. They appear to me to be means of amendment—means of correcting errors in decrees and orders. Whilst a decree remains in minutes, and anything appears therein doubtfully expressed, or contrary to the plain sense and meaning of the Court, or it appears that anything has been omitted therefrom which ought to have been inserted, and the Registrar refuses to make an alteration in them, an application must be made to the Court to vary the minutes. This application is now usually made by motion, 2 Dan., C.P., p. 911. But after a decree or order has been *passed* and *entered*, the Court will not entertain any application to vary it unless in matters quite of course. The proper method of having a decree or order rectified in other matters is by applying to have the case reheard. *Idem*, p. 925; also *Seton*, 1,143. To say, then, that the Primary Judge has not power to rehear a case, is to say that however manifestly erroneous a decree or order may be, yet he has no power whatever, after a decree or order has been passed and entered, to rectify such errors. Referring to the Equity Act, 1866, sec. 7, it would appear that the Supreme Court in its equitable jurisdiction possesses the like jurisdiction and authority to administer justice, and to exercise and perform all the like acts, matters, and things within the said province, as the Lord High Chancellor of Great Britain, or the High Court of Chancery, has within the realm of England; and by the 9th section the Primary Judge is, when appointed, empowered to hear and determine all causes and matters at any time depending in the Supreme Court in its equitable jurisdiction. Thus is taken from the Full Court all original jurisdiction, which thenceforward is to be exercised by the Primary Judge. By the 11th section the Full Court is constituted a Court of Appeal in Equity. Rehearings before the same Judge who originally heard the cause, are (as means of correcting errors) part of the usual and settled practice of the High Court of Chancery; therefore the Supreme Court (Full Court) before the appointment of a Primary Judge possessed the power to rehear, and as the Primary Judge

possesses and can exercise all the powers which before his appointment were vested in the Full Court, he has power to rehear as well as to hear causes. And it appears to me to be quite immaterial whether the first hearing was before the Full Court or before the Primary Judge himself. He is to determine "all matters depending in the Supreme Court," and a petition for a rehearing, to my mind, may be as much a matter depending as interrogatories awaiting an answer. The grievance to the litigant is not the less because the error was made by the Full Court, nor is his right to have it corrected lessened, and the Primary Judge now alone possesses the power to rehear. Assuming that the personal representative (the executor) of the late Mr. Coulthard, and also the residuary devisee of his real estate, are properly before the Court, I do not consider it necessary that the heir-at-law should have been a party to the suit. It was pointed out on the rehearing that the plaintiff contained in himself two conflicting interests—that of a creditor and that of the personal representative of the late Mr. Coulthard. No doubt separate counsel should have appeared, one for the creditor, another for the personal representative; and no doubt, if the objection had been taken on the first hearing, that course would have been insisted on by the Court. The material grounds, however, urged by the defendants' counsel for setting aside the decretal order made in this cause were—First, that the debt of the plaintiff was not satisfactorily proved; and secondly, that there was no proper proof of Mr. Coulthard's will. The proof of debt rests mainly, if not altogether, on the affidavit of the plaintiff filed on the 22nd January, 1867, and on the affidavit of Mr. Fenn filed on the 18th February, 1867. As to Mr. Fenn's affidavit, I think it should not have been received, because it would appear on the face of that affidavit, that at the time of the admissions of the debt by Coulthard therein deposed to, Mr. Fenn was acting as the solicitor of Mr. Coulthard. Then the plaintiff has to rely on his own affidavit, which is worded very vague and unsatisfactory. He says, "I say that the said William Robson Coulthard was, at the time of his death, indebted to me in the sum of fourteen hundred pounds and upwards, and that a large portion of the said sum still remains due and owing to me from the estate of the said William Robson Coulthard." It does

not state the consideration of the £1,400, nor what previous balance of that amount was due at Mr. Coulthard's death. On the other hand the defendant (Mrs. Haynes, late Coulthard) absolutely denies the indebtedness of her late husband; at any rate so far as her belief goes. As the existence of the plaintiff's debt (putting aside Mr. Fenn's affidavit) rests upon the unsupported testimony of the plaintiff, I do not think the decree should have been made, because I understand it to be a rule constantly acted on in Equity, that the unsupported testimony of any person on his own behalf cannot be safely acted on. Then, with regard to Mr. Coulthard's will, which it was necessary to prove for two purposes—to show that the plaintiff was the executor named therein, and that the defendant Mrs. Coulthard (now Haynes) was the residuary devisee of the real estate—was it properly proved? I think not. The only proof offered to the Court was the affidavit of Mr. England as to its execution and contents, but that is not the way to prove a will. The Property Act of 1860, s. 32, makes the probate, after notice, *primâ facie* evidence both of the contents and of the due execution; or the attendance with the will of the proper officer in whose custody it was deposited might have been procured, and its execution proved either *viva voce* or as an exhibit; but I am quite clear that the proof offered to the Court was altogether inadmissible for the purpose. Upon the grounds therefore, that neither the debt of the plaintiff nor the will of Mr. Coulthard was proved, I am of opinion that the decretal order made in this cause must be discharged or set aside—the question of costs reserved.

Decree set aside.

GWYNNE, J., WEARING, J.] [COMMON LAW.

3 AND 9 MAY, 1870.

FREEBAIRN v. RYAN.

STAT. 13 GEO. II., c. 18.—Certiorari—Notice to Justices.

Statute 13, Geo. II., c. 18, S. 5, applies to this province, and certiorari *will not go unless the notice thereby required has been given to the Justices making the conviction or order before the motion for the rule.*

THIS was an application for a writ of *certiorari*, in which a preliminary objection had been taken that the Magistrate ought to have had notice of the intention to move under Act 13 Geo. II., c. 18, the 5th section of which is to the following effect: —"From and after the 24th June, 1740, no writ of *certiorari* shall be granted to remove any conviction, judgment, order, or other proceedings had or made by or before any Justice or Justices of the Peace of any county, city, borough town, corporate or liberty, or the respective General or Quarter Sessions thereof, unless such *certiorari* be moved or applied for within six calendar months next after such conviction, judgment, order, or other proceeding shall be so had or made, and unless it be duly proved upon oath that the said party or parties suing forth the same hath or have given six days' notice thereof in writing to the Justice or Justices, or two of them, if so many there be, by and before whom such conviction, judgment, order, or other proceeding shall be so had or made, to the end that such Justice or Justices, or the parties therein concerned, may show cause, if he or they shall so think fit, against the issuing or granting of such *certiorari*."

J. Downer for the Justices.—The office of Justice of the Peace in the colony is the same as the office of Justice of the Peace in England; and as the colonists brought with them such of the English laws as were applicable, it is but equitable to suppose that the Imperial Legislature intended to give to the Justices the same protection. If there was any doubt, it was removed by the local Act No. 2 of 1843, entitled "An Ordinance to facilitate the adoption of the laws of England in the administration of justice in South Australia." (GWYNNE, J.—Do you consider that Justices of the Peace ever existed in this colony? If so, it must be either by

Statute Law or Common Law. I suppose you assume that they exist by Common Law. I am aware of no Statute which authorizes any one to appoint such an officer, and I have looked carefully. Therefore, if they exist at all, it must be by Common Law.) Yes; and if they do not exist at all, *certiorari* would hardly go. (GWYNNE, J.—This was a Court of Magistrates, was it?) Yes. (GWYNNE, J.—The jurisdiction they ask for a *certiorari* to go to is that of a Magistrate?) Yes.

Stow, Q.C.—*Certiorari* would go to any one assuming jurisdiction.

Downer.—Had the description of the English Act been "any Justice of the Peace," there could have been no argument about it; but it was the words relating to counties and boroughs and other divisions which let in the doubt. Then, was it to be said that because the Legislature had mentioned specifically every species of Justice of the Peace they knew of, instead of confining themselves to the general statement that enumerating them rendered the Act inapplicable to the colony? The mischief that the provision was intended to remedy existed precisely the same here as it existed in England. The Act No. 31 of 1855-6, "An Act to consolidate the several Ordinances relating to the establishment of the Supreme Court," which gave them the same power as the King's Bench had in England, provided also that it should be exercised subject to the same restrictions and in the same manner. In every way the Statute was one which might be in force in the colony. It was not made to redress a local grievance, and was just as applicable to a colony as to England. In

James v. *Brind*,

reported in the *Register*, April 19 and June 7, 1861, a similar question was raised with regard to the Statute of William and Mary, which the Court, including then Sir CHARLES COOPER, decided did apply both on general grounds and by the effect of the local Act No. 2 of 1843, which declared that everything required to be done by a constable or peace officer in England might be done by a constable or peace officer of this province. The same Act provides

that when by an Act of Parliament which could be applied in the administration of justice in South Australia, anything was authorized and required to be done by or before any Justice of the Peace, the same might be lawfully done before any Justice of the Peace in the province. *James* v. *Brind*, referred to the case of

Attorney-General v. *Steward*, 2 Mer., 143,

which is the leading case on the subject, and the whole of the reasoning of Sir W. Grant against the Statute of Mortmain applying to Colonies, goes to show that the Statute of Geo. II. is applicable here. The provision of 13 Geo. II., c. 18, is a general regulation applicable to any country in which English Justices of the Peace exist.

Stow, Q.C., and *Andrews, Q.C.*, in support of the rule—In reply to the point as to whether notice is required to be served upon the Magistrate, that depends on two questions—first, whether the provision of the English Statute *ipso facto* became part of the law of the colony of South Australia upon its foundation, and if not, whether the Statute of 1843 made it applicable. The case of the *Attorney-General* v. *Steward* decided or affirmed what was always understood to be the law, that on the establishment of a new colony so much of the English law as was applicable was introduced or became *ipso facto* their law. But the Statute in question was not a part of the law which was applicable to colonies, but was entirely local in its nature. The clause—and it was only one clause which it was argued did apply—referred to no such persons as Justices of the Peace generally, and *Mr. Downer* was altogether in error in stating that the Legislature had enumerated all the Justices of the Peace. The establishment and jurisdiction of Justices of the Peace in England was altogether local, with the exception of the Lord Chancellor, Lord High Steward, the officers of the Queen's Bench, Master of the Rolls, and some few others. The writ of *certiorari* to bring up the judgment of an inferior Court was a common law right, and being so could only be taken away by express words of an Act of Parliament. The Act which limited the right of the subject to have proceedings removed referred to no person who

held the office of "Justice of the Peace for the country of England," which would be the only office analogous to that of "Justice of the Peace for the whole of South Australia." It referred to Justices whose powers were altogether local—applicable to part only of England, and not the whole of it. They were described as Justices of the Peace "of any county, city, borough town, corporate or liberty." It was only one part of the Act that could be applied to the colony, because the others were for "pulling down turnpikes," "preventing exaction upon the River Thames," &c. To show that there were Justices having jurisdiction in all England, see Blackstone, 340. The powers of the English Justices were conferred upon the South Australian Justices as far as they were applicable, and so far as the exercise of that jurisdiction so conferred was concerned they were entitled to the same protection under the Act of 1843, but no further.

Cur. ad. vult.

9 May—

GWYNNE, J., delivered the judgment of the Court:—We have considered with a good deal of attention the case of the *Attorney-General* v. *Steward*, 2 Merrivale, and we have lingered upon the judgment of Sir William Grant as being the leading case upon the subject. The question here is whether or not the requirement of notice to proceed against a Magistrate is of universal application, or whether it is an Act which has reference to certain locality, and specially to certain persons. The Act at home was passed for the protection of gentlemen serving in the onerous and responsible situation of Magistrates of counties and other territorial divisions of England, the functions of which they discharge without any fee or reward. The Act was passed to afford to gentlemen who were giving their services gratuitously to the State greater protection. As pointed out, no doubt the Magistrates here have a much larger territorial jurisdiction, as Justices for the whole colony of South Australia; but we do not see that because a man has a more extended jurisdiction, that therefore the principle of protection should not be extended to him. They are both serving their country without fee or reward, and Magistrates here as well as in England are entitled to every protection the law can reason-

ably throw around them. As the whole policy of the Statute in England was to protect what were called the great unpaid, we see no reason why the same protection should not be extended here. Although we have some doubt upon it, the best opinion we can form is that the Statute is applicable to the administration of justice in this colony, and we find no local legislation with which it is inconsistent.

Rule discharged.

GWYNNE, J., WEARING, J.] [CRIMINAL.

MARCH 30, 1870.

RE HARRIET WARREN.

MARRIAGE ACT, 1867.—*On indictment for bigamy it was objected and proved that the person who performed the second marriage had no power so to do, and the marriage was therefore null and void. It appeared, however, that the Registrar-General of Marriages had improperly published such person's name in the* Government Gazette *as having been duly enrolled an officiating minister under the Act. Sec.* 13 *of* 15, 1867, *makes the* Gazette *conclusive evidence that the persons therein so mentioned are officiating ministers under the Act.*

Held—*That the* Gazette *notice was conclusive; and that such person therefore would be taken to be an officiating minister though in fact he was not.*

THIS was an indictment for bigamy which had been heard at the February Criminal Sittings before GWYNNE, J., when the prisoner was convicted but sentence deferred. The question was, whether the prisoner's second marriage had been properly solemnized or not.

Mr. Hammond of Port Lincoln, a minister of the Church of England, had performed the ceremony; but it did not appear that his name had been entered in the book kept by the Registrar-General under Act 3 of 1855-6 as an officiating minister; nor had he been enrolled as such under the Marriage Act 1867, ss. 9, 10.

The Registrar-General of Marriages had nevertheless caused his name to be published in the *Government Gazette* as being an officiating minister under the Marriage Act of 1867, and the *Gazette* is, under s. 13 of that Act, conclusive evidence of the due enrolment of the persons named therein.

GWYNNE, J., said his feeling was that Mr. Hammond, the minister, had no right to perform the ceremony, because he claimed under the new Marriage Act, not as an officiating minister, which was a peculiar creation of the Statute, but as a clergyman of the Church of England. The first Act recognised clergymen of the Churches of England and Scotland as entitled to perform marriages by virtue of their sacred office as priests or deacons. By a subsequent Act they had to sign the roll, but that formed no part of the essence of their official character, though they were subjected to a fine if they did not sign it. Under the new law it was made an essential qualification for their duties, and the Registrar-General was to publish in the *Gazette* a list, which it was intended should be prepared from a book signed by the officiating ministers. The object of the Legislature, he conceived, was to have all the ministers of religion in one class and upon one *status*, but those who were on under the old law were to be continued; and it appeared to him it was the duty of the Registrar-General to have put those gentlemen's names on the new roll, but he made a mistake in putting any one's name in the *Gazette* except those who were on as officiating ministers as distinguished from clergymen of the Churches of England or Scotland. Still it was not so clear as to excite any wonder that Mr. Cleland had placed another construction upon it. It seemed to him that Mr. Hammond's name should not have been placed in that list; but as it was there, and the Act said the *Gazette* should be conclusive evidence, he must be taken to be what he was not, namely, on the roll as an officiating minister.

GWYNNE, J., PRIMARY JUDGE.] [EQUITY.

11 AND 25 APRIL, 1870.

BARTLEY v. BOSWORTH AND OTHERS.

MARRIED WOMAN.—Acknowledgment—Act 15 *of* 1845—*Separate use—Alienation.*

A, by will, bequeathed land to B and C upon trust, to hold for D, a married woman, during her life, and after her death to such of her children as she should appoint; and, in default of appointment, to all of them equally, with a declaration that the rents and profits of the land devised should be appropriated to the separate maintenance of D, free of any engagement of her husband.

By mortgage, D and E, her husband, conveyed all the interest of D in the land devised, and the rent and profits thereof, to F, but the deed was not acknowledged by D under Act 15 *of* 1845, *s.* 2. *The consideration for the mortgage moved to E, the husband before marriage.*

On bill filed by F, against B and C, for a declaration that the Trustees were liable personally for rent and profits received after notice of the mortgage, and for an account of such rents and profits,

Held—1. *That on a proper construction of the will the devise was to the separate use of D.*

2. *That, the declaration in the will, that the rents and profits of the land should be applied to the maintenance of D, did not operate as any restraint on alienation by her.*

3. *That a married woman is, as regards property of which she is seised to her separate use, a* femme sole, *that Act* 15 *of* 1845, *s.* 2, *referred to conveyances by married women of land, of which they were not so seised, and that here, therefore, no acknowledgment was necessary.*

4. *That the mortgage operated as a direction to B and C to hold the land devised to the new trusts therein contained.*

THE suit was instituted by Mr. Wm. Bartley, as mortgagee, against the separate estate of Mrs. George Worthington, of Melbourne, who, under the will of the late Richard Bosworth, of Prior's Court, held an interest in certain property in this colony, of which Richard Daniel Bosworth and John Bosworth were Trustees.

The following are the facts:—On the 10th July, 1866, Richard Bosworth, the father of Mrs. Worthington, made his will, and

thereby devised to the defendants—Richard Daniel Bosworth and John Bosworth, their heirs and assigns—real estate situate in South Australia upon trust, to hold the same for the defendant, Anne Worthington, for the term of her natural life, and after her decease to such of the children of the defendant, Anne Worthington, as she should by deed or will appoint; and, in default of appointment, to the children of the said Anne Worthington equally; and the testator declared that the rents and profits of the land thereby devised for the benefit of the said Anne Worthington should be appropriated to the separate maintenance of the said defendant, Anne Worthington, and should not be subject to any engagement or debt of the defendant, George Worthington, or of any husband she might thereafter marry. On the 7th of March, 1867, by an indenture of mortgage made between the defendants, George Worthington and Anne, his wife, of the one part, and the said William Bartley (the plaintiff) of the other part, the said Anne Worthington, with the concurrence of her husband, the said George Worthington, did grant, bargain, sell, assign, and dispose of, and the said George Worthington did grant and confirm unto the plaintiff all the estate and interest whatsoever of the said Anne Worthington of and in all the said land so devised as aforesaid, and all the rents and profits thereof to accrue due during the life of the said Anne Worthington, to secure payment by the said George Worthington or Anne, his wife, unto the plaintiff of the sum of £750 on the 7th March, 1872, and in the meantime interest, after the rate of ten per cent. per annum yearly, with power of sale in case of default. The consideration for this mortgage moved to Mr. Worthington before marriage. The whole of the said principal and interest is now due to the said plaintiff on the said mortgage security. The defendants, Richard Daniel Bosworth and John Bosworth, as Trustees under the said will, have received the rents and profits of the mortgaged premises since the death of the testator, but have not paid over the same to Mrs. Worthington since they had notice of Mr. Bartley's mortgage, but have retained the money in their own hands.

The bill prayed for a declaration that the defendants were personally liable to the plaintiff in respect of all rents and profits

of the land devised which came to their hands after the notice of the mortgage, and for an account of such rents and profits.

Belt and *Scott* for the plaintiff.—The questions raised by the answer are, firstly, whether the will gave Mrs. Worthington the separate estate; and secondly, whether she could mortgage that estate without an acknowledgment of the deed before the Master or Commissioners. It would make no difference, if for her separate use, whether she had only a life estate or the fee.

Cape v. *Cape*, 2 Y. & C., 543
Taylor v. *Meads*, 34 L.J.Ch., N.S. 203
Stead v. *Nelson*, 2 Beav., 245
Wainwright v. *Hardisty*, Ibid, 363
Dowell v. *Dew*, 1 Y. & C.C.C., 355
Lechmere v. *Brotheridge*, 32 Beav., 353,

show the position of a married woman in respect of life estates in land. In every respect, a woman possessing a separate estate is treated as a *femme sole*—

Lewin on Trusts, 492.
Adams v. *Gamble*, 11 Ir. Ch. Rep., 269
Atcheson v. *Le Mann*, 23 L.T., 302.

For the difference of the position of a married woman who has an estate in fee simple settled to her separate use from a married woman who has an estate of inheritance not settled to her separate use see

Blatchford v. *Woolley*, 32 L.J., 534, Ch.

The later authorities carried the power of the married woman further than the earlier ones. The words of the will show clearly the intention of the testator to devise to Mrs. Worthington's separate use. The next question is, Does the Act No. 15 of 1845 alter the estates of married women settled to their separate use? The 3rd section provides that every deed acknowledged, as provided by the Act, shall be as effectual as any fine or recovery for the

like purpose would have been in England before the abolition of the Act for the abolition of fines and recoveries. Again, the Act said it should only have effect from the time of acknowledgment. Therefore, only supposing it to be read as the other side would contend it should be, it would absolutely incapacitate a married woman from making any contract whatever, as it could only take effect from the time of acknowledgment. (GWYNNE, J.—And there is no power in the world to make her acknowledge?) None. (GWYNNE, J.—There is a *locus penitentiæ*, therefore.) Yes. She may contract every day, but until she acknowledges those contracts amount to nothing. The Act recites that its purpose is to provide a "simple mode," &c. It is an enabling statute, not restrictive. Its object was clearly not to fetter but to assist conveyances by married women.

Hardy and *Ingleby*, for the defendants.—In all the cases which have been cited there was a valuable consideration moving to the wife, and here there was none. There was also in all those cases a trust to pay rents and profits to the married woman for her life; but in this case, as appeared from the face of the bill, there was no such trust—

Ross's Trust, 1 Sim., N.S , 199.

Secondly, Act No. 15 of 1845 says:—"From and after the passing of this Ordinance, conveyances and assurances by any married woman of any estate, right, title, or interest of, in, to, or out of any lands, tenements, or hereditaments in this province, shall, and may be executed and acknowledged by her in the manner aftermentioned." In the 2nd clause, which was penned from the 77th of the English Statute 3 and 4 Wm. IV., c. 74, there was a material alteration. The English Act referred to any estate "in any lands," the meaning of which was perfectly known; but what could be the meaning of the words "any estate, right, title, or interest of, in, to, or out of any lands?" Courts of Law did not know of any estate "out of land." Those words were intended by the framers of the colonial Act to include equitable as well as legal estates, for marital influence might equally affect a woman whether it was a legal or equitable estate which she

possessed. The object of the Legislature was that whatever estate the woman conveyed, whether equitable or legal, should be acknowledged by her, to show that she acted without marital control. If the 77th clause of the English Statute stood apart from the 78th, the Courts of Equity would have been compelled to come to the conclusion, under the English Act, that the estate of a married woman must be acknowledged. What relieved them was the 78th clause—"Provided always, and be it further enacted, that the powers of disposition given to a married woman by this Act shall not interfere with any power which, independently of this Act, may be vested in, or limited, or secured to her so as to prevent her from exercising such power in any case, except so far as by any disposition made by her under this Act she may be prevented from so doing in consequence of such power having been expended or extinguished by such disposition." That was to leave the separate estate of a married woman in the same position as if she were a *femme sole*, but there is no similar clause in the local Act. The Legislature first of all used words in the 77th clause having a much larger effect than the English Act, which required the concurrence of the husband before any disposition, surrender, or release, should be valid; and they also omitted the 78th clause.

Cur. ad. vult.

25 April, 1870—

Judgment was now delivered as follows, by GWYNNE, J.:—In this suit Mr. Bartley, the plaintiff, seeks from the defendants, George Worthington and Anne, his wife, payment of £750 and interest, secured by the mortgage afterwards mentioned; and from the defendants Richard Daniel and John Bosworth, an account of the rents and profits of the land and premises included in the mortgage received by them, and for a decree declaring them personally liable for such of the rents as they may have received after notice to them of the plaintiff's mortgage. The bill further prays for a Receiver. The cause came on upon bill and answer. The following are the facts upon which the plaintiff relies for equitable relief. (His Honor here detailed the facts as before set forth.)

The bill was taken *pro confesso* as against Mr. and Mrs. Worthington, for want of an answer; but the other defendants, the Trustees, appeared on the hearing, and urge the defence submitted by their answer, namely, that the mortgage deed of the 7th March, 1867, was void as against Anne Worthington, by reason that the deed was not acknowledged by her in the manner prescribed by the Act of the local Legislature passed on the 25th July, 1845 (being No. 15 of 1845), intituled "An Ordinance to render effectual conveyances by married women, and to declare the effect of certain deeds in relation to dower." They further contended by their counsel that the debt due Mr. Bartley was a pre-existing debt, contracted by the husband, Mr. George Worthington, before his marriage with his wife, she receiving no money down or other consideration at the time of its execution, and that on the ground of want of consideration the debt was not binding on Mrs. Worthington. On reading the devise to Mrs. Worthington in her father's will, I am quite clear that on a proper construction of the will that devise is of the property to Mrs. Worthington's *separate use*. It was said, however, at the bar, that the declaration contained in the will, that the rents and profits of the devised lands should be appropriated to the *separate maintenance* of Mrs. Worthington, raised a personal suit in her favour, and gave the Trustees the control of the property, and obliged them to superintend it for the benefit of Mrs. Worthington, or, at all events, that the term "maintenance" amounted to a restriction on alienation. In my opinion, the cases are altogether against the defendants upon this head. I will only refer to two of them. In *Margetts* v. *Barringer*, 7 Sim., 482, the words were "for her livelihood." In *Cape* v. *Cape*, 2 Y. & C., 543, "I do direct may be applied to the support and maintenance of the wife," &c. In these cases it was held that the wife took absolutely for her separate use, and, as I have already said, so, in my opinion, did Mrs. Worthington. Then I come to the principal point raised on behalf of the defendants (the Trustees), that the mortgage-deed was not acknowledged by Mrs. Worthington under the local Act, No. 15 of 1845. It appears to me that where the equitable principle which governs separate estates of married women is considered, it is very strange such an objection as this should ever have received any countenance from the Courts. What is

the *status* of a married woman in respect of property settled to her separate use without any restraint on alienation? Why, she is endowed with all the powers of the dominion over it, precisely as if she were free from the fetters and disability of coverture; in other words, as if she were a *femme sole*. This is the settled doctrine of Courts of Equity. In this Court, says Lord Langdale, (in *Tullet* v. *Armstrong*, 1 Beav., 1), a married woman has for more than a century been considered as capable of possessing property to her use, independent of her husband; such property is called her separate estate, and in respect of it she is considered as a *femme sole*, enjoying and capable of exercising her rights as such. And see the very luminous judgment of Lord Westbury, in *Taylor* v. *Meads*, 34 L.J., N.S., p. 206. Then, if Mrs. Worthington had, at the time of execution of Mr. Bartley's mortgage-deed, all the rights and dominion over the mortgaged property as if she then had been single and unmarried, why should it be necessary to the effect of her deed that it should be acknowledged under the Act No. 15 of 1845? That Act seems to me to proceed upon the assumption that fines and recoveries could not at any time have been levied or suffered in South Australia. And upon that assumption it proceeds to render effectual conveyances by married women, and to provide a simpler mode of assurance, whereby the right and title of married women to dower and all other their estates, &c., in land, may be conveyed. (See title and preamble.) But the interest created by separate use was in existence and well established for some centuries before this Act; and the mischief or inconvenience which the Act essayed to cure had no application to separate use; separate use was not within the mischief, and therefore not within the remedy. Both at the time and before the passing of the Act, a married woman having property settled to her separate estate, without restraint on alienation, could convey as effectually and simply as any other person (male or female) who was *sui juris*. And here again I am tempted to quote from Lord Westbury's judgment the following remarks, which, although made in reference to the law of England on this head, are in principle equally applicable to the law of South Australia. "The interest created by the separate use," observes his Lordship, "is the creature of equity to which there is nothing correspondent at

law, and which would be deprived of its character if it were made subject to a form of alienation that proceeds upon the basis of the existence of control and interest in the husband and personal disability in the wife." I must hold, therefore, both from principle and authority, that Mrs. Worthington, though a *femme couverte*, but not restrained from alienation, had, as incident to her separate estate, and without any express power, a complete right of alienation, and that she well exercised that right by executing the mortgage-deed of the 7th March, 1867, though such deed was not acknowledged by her in pursuance of the Act No. 15 of 1843. Then, looking at the form of the bill and the relief sought, I find some little difficulty, and I ask what precise interest passed to Mr. Bartley? According to Lord Westbury, in *Taylor* v. *Meads (ubi supra)*, "the true theory of her (a married woman's) alienation is that any instrument, be it deed or writing, when signed by her operates as a direction to the trustees to *convey* or *hold* the estate according to the new trust which is created by such direction. This is sufficient to convey the *femme couverte's* equitable interests. When the trust thus created is clothed by the trustees with the legal estate, the alienation is complete both at law and in equity." Now, the plaintiff by his bill does not pray that his equitable mortgage shall be clothed (by the trustees) with the legal estate of Mrs. Worthington's life interest, nor does he ask that the trustees shall be decreed to hold the estate in future according to the trusts of the mortgage-deed, but he only seeks a declaration by this Court that the trustees are personally liable in respect of rents and profits received by them after notice of the mortgage, and asks an account consequent upon such declaration. A person may complain of part of his wrong, and may ask for a part only of the relief to which he may be entitled, and I make the declaration required, and am prepared to make any decree consistent with the principles I have in this judgment affirmed. But there will be no decree that Mrs. Worthington shall pay to the plaintiff the amount of principal and interest found to be due on the mortgage, because in these cases the Court can make no personal decree against a married woman, but can affect her separate estate only. From the view I have expressed above, it follows that I consider the objection, that the mortgage-deed was without competence, has no force.

Decree as prayed.

GWYNNE, J., WEARING, J.] [COMMON LAW.

10 MARCH AND 9 MAY, 1870.

HANSON v. CORPORATION OF ADELAIDE.

ARBITRATOR—EVIDENCE.—Mayor—Corporation—Promise.

On action by an arbitrator to recover his fees of arbitration on a submission, which authorized him to make and publish his award of and concerning the matters in difference, &c., and to declare by whom the costs were to be paid, the arbitrator sought to give parol evidence of his having made the award, and of the persons liable to pay the costs.

Held—*That this evidence was inadmissible, and that the award should have been produced.*

Where a Mayor and Corporation have submitted a matter to arbitration, the Corporation is not bound by a subsequent promise made by the Mayor alone, to pay the arbitrators' fees.

THIS was an action brought by the plaintiff, Mr. William Hanson, against the Corporation of Adelaide, for work and labour done as an arbitrator. The facts appear sufficiently in the judgment of GWYNNE, J.

Belt, for plaintiff.—The plaintiff stated at the trial that an award had been made and published, but the last evidence was objected to on the ground that verbal evidence of the award which was in writing was inadmissible. The plaintiff, though having the award in his custody, had no power to open it, unless his co-arbitrators were parties to the suit, or gave their consent.

Re *Coombes*, 4 Exchq., 841, and
Nosworthy v. *Hallett*, 3 S.A. L.R., 52,

tried before the Chief Justice on the 24th September, 1867, where evidence of an award having been made was given and allowed by the Chief Justice without the contents being shown. But the promise of the Mayor, an integral part of the Corporation, was sufficient to prove the *primâ facie* case of the plaintiff—

Marsack v. *Webber*, 6 Exch. N.S. 1.

Stow, Q.C., for defendants.—The question in *Nosworthy* v. *Hallett* was altogether different. The action there was for a *mandamus* to compel the Central Road Board to take up the award, that they might know what the contents were. The point in this case was whether the award had been made. The evidence merely proved that there was a document, signed by certain parties, and whether that was the award could only be decided by the document itself. As to the subsequent promise by the Mayor, that would not render the defendants liable, the Mayor having no authority to bind the Corporation by such promise.

Cur. ad. vult.

9 May—

GWYNNE, J., now read the judgment of the Court :—This was a case for the opinion of this Court, sent up by the Special Magistrate of the Local Court of Adelaide. The facts are stated in the case, by which it appears that the plaintiff brought his action in the Local Court to recover compensation for his services as an arbitrator in a submission between one Thomas Hall and the defendants. That the submission contained these words :—"And that the costs of the said reference and award shall be, in the discretion of the said arbitrators, or any two of them, who may award by whom, to whom, and in what manner the same shall be paid." It further appears from the case that amongst other grounds of defence was this—"that the plaintiff and his co-arbitrators did not make and publish their award in and about the premises as alleged," and that on the trial in the Local Court the plaintiff's counsel produced a document which he proved was an award made in the matter of the submission and signed by the arbitrators, but he refused to put the writing in evidence or to have it read to the Court. There was evidence that the Mayor of Adelaide individually expressly promised to remunerate the plaintiff for his trouble as arbitrator, and that such promise was made during the time that the arbitration was proceeding, therefore presumably after the common seal of the Corporation had been attached to the submission. The case then informs this Court that "the Local Court found a verdict for the plaintiff, subject to the opinion of the Supreme Court on the admissibility of the above

evidence;" and also "whether the plaintiff was enabled to recover without any express promise of payment;" and if not, whether the power of the Mayor alone amounted to a sufficient express promise. Mr. Russell, in his book on Awards, p. 450, tells us—"Though the cases are not quite agreed on the subject, it seems the better opinion that the appointment of an arbitrator is not of such a nature as to raise an implied promise to pay him a reasonable compensation for his services." Where, however, there is an express promise, an action will lie—*Hoggins* v. *Gordon*, 3 Q.B., 466; *Hardress* v. *Provod*, Sty., 465. It does not appear from the case whether the submission was given in evidence in the Local Court or not. Presumably it was not, and therefore strictly we ought not to look at it now; but, however, it was put in on the argument before the Court, and used as the basis of *Mr. Belt's* argument. He contended that the words, "and that the costs of the said reference and award shall be in the discretion of the said arbitrator, or any two of them, who may award by whom, to whom, and in what manner the same shall be paid," contained in the submission, amounted to an express representation to the plaintiff that he should be paid; and he cited *Marsack* v. *Webber*, 6 Exch., N.S. 1. But it must be observed that *Marsack* v. *Webber* was not an action like the present, by an arbitrator against one of the parties to the submission to recover compensation for his services, but was an action for money paid, brought by one party to the submission against the other, to recover contribution (one moiety), the plaintiff having paid the whole of the arbitrators' fees, in order to take up the award. The question incidentally arose whether the payment of the money sought to be recovered was a voluntary payment or not, and thus whether the arbitrator could compel payment of his fees, or, in other words, whether the submission was evidence of an express contract, as between the arbitrator and the plaintiff. Baron Park, however, who delivered the judgment of the Court, after stating the argument, declines to decide it. He says—"Without going into that question, we think that when two parties agree to employ an arbitrator, and one pays a sum of money to take up the award, in reason, justice, and law he is entitled to recover from the other a moiety of the sum so paid.'

It is true dicta occur *(arguendo)* both of Martin, B., and Channell, B., which favour *Mr. Belt's* position; but we say the point was not decided in *Marsack* v. *Webber*. *Bates* v. *Townley*, 2 Exch. p. 152, was likewise an action between the parties to the submission. Then Park, B., says—"This contract (the submission) of the two parties *is evidence* by their own admission that the arbitrators were to be paid for their trouble, and might be used for that purpose if the arbitrators had to sue the parties for their services." The language, however, of the submission in *Bates* v. *Townley* was very different from that of the submission in the case now before us. It was that " the costs of the reference and the award to be made in pursuance thereof, *including a reasonable compensation to the said arbitrators for their trouble*, should be in the discretion of the arbitrators," &c. As, according to our view of this case, it is not necessary to decide the above point, we decline to do so. As respects the promise of the Mayor, we think it amounts to nothing. That Corporations aggregate may in certain cases submit disputes to arbitration is beyond doubt; and it is not disputed that the Corporation of Adelaide had the power to enter into that submission in the present case. But we find that it is laid down in Bac. Abr. Arbit (C) 275, that a Dean without a Chapter, a Mayor without his Commonalty, the Master of a College or Hospital without his Fellows, cannot submit to an award, for the submission has the force of a contract, and they cannot contract without them; and of course such submission must be executed under their Corporation seal. The above seems to us an authority that the promise of the Mayor could not bind the Corporation, and especially after the Corporate seal had been attached to the submission. Then comes the question as to the admissibility of evidence. We think the evidence as to the award, as far a it went, was admissible to show the existence of the award, but certainly not to prove its contents. In *Adcock* v. *Wood*, 6 Exch., 814, when defendant pleaded that " the arbitrator did not make his award of and concerning the matters in difference," it was held that the validity of the award was not in question, but the making of and concerning, &c. And we are of opinion that in the present case the third portion of defence (or plea) put on the plaintiff the onus of proving that the plaintiff (Mr. Hanson) and his co-arbi-

trators made their award in and about the premises, which it appears to us they could only do by proving the submission and the contents of the award, which it appears the plaintiff did not do.

The questions to be answered in the negative, the defendants to have costs.

GWYNNE, J., WEARING, J.] [COMMON LAW.

6 MAY AND 3 JUNE, 1870.

JACOMB v. MACGEORGE.

SEQUESTRATION IN VICTORIA.—Creditor—Payment after sequestration order.

A Statute of the colony of Victoria provides that where the person against whom an order of sequestration shall be made shall pay any money to the person who obtained it of greater amount than he would have been entitled to had he proceeded with the sequestration, and the sequestration is prosecuted by other creditors, then the person receiving such money shall repay it to such persons the Supreme Court of Victoria should appoint, for the benefit of the creditors of the said insolvent.

The declaration alleged that the defendant obtained an order of sequestration against J. in Victoria, whereupon J. paid £200, and the defendants did not further prosecute the sequestration. That subsequently it was prosecuted by other creditors of J., and, under the statute above mentioned, the Supreme Court of Victoria appointed the plaintiff to be the person to whom the defendant should repay the said money. On demurrer,

Held—*That the order gave the plaintiff no right to sue—the duty being, both before and after the order, a duty to the Court and not to the plaintiff.*

On demurrer, one counsel only can be heard on each side.

THE declaration stated that Mr. Henry Swanson being indebted to the defendants, they took proceedings against him in the colony of Victoria, and procured an order of sequestration. That afterwards Swanson paid them £200, and they thereupon made default in prosecuting the sequestration. That other creditors prosecuted

the sequestration according to the law of Victoria, and the estate of Swanson became sequestrated for the benefit of his creditors. That by the Victorian law "if any person against whom any order of sequestration shall have been made, shall pay money to the person who obtained the same, or give, or deliver to any such person any satisfaction or security for his debt, or any part thereof, whereby such person may receive more in the pound in respect of his debt than he would be entitled to receive if the sequestration were proceeded with and the estate distributed among the creditors according to their legal rights and preferences, *such payment*, gift, &c., shall be a new act of insolvency, and *every person so receiving such money*, &c., shall, in the event of the sequestration being afterwards proceeded in by other creditors, deliver up such security and shall *repay the said money*, gift, &c., or the full value thereof to such person as the said *Supreme Court of Victoria shall appoint*, for the benefit of the creditors of such insolvent, and also all costs of procuring the reversal of such sequestration." That the Supreme Court of Victoria on the 21st May, 1868, by an order in writing did order and appoint the plaintiff to be the person to whom the defendant should pay for the benefit of the creditors of the said Henry Swanson, pursuant to the said law, the said sum of £200 so paid to them by him.

Demurrer.—That declaration disclosed no right of action in the plaintiff.

Ingleby, for defendants.—It will be presumed, in the absence of any statement to the contrary, that the debt to Messrs. Macgeorge & Co. was contracted here. Both debtor and creditors being persons resident in this colony, the debtor went to Victoria, where he was pursued by his creditors, and proceedings taken against him. Supposing that to be the case, and that he obtained his discharge, that release would not be an effectual bar to the recovery of the debt in South Australia, if he ever came back again. On this declaration that state of facts would be presumed, because it did not allege that the debt was contracted in Victoria, and, assuming that the debt of Messrs. Macgeorge was not merged or lost by their suing in Victoria, they had a right *quoad* this colony to

receive payment here, though *quoad* Victoria they might not have had a right to receive payment there. (GWYNNE, J.—They had a right to receive payment anywhere if they took their debtor's own chattel or money, but they had only the right to receive payment of Mr. Swanson, not of his creditors.) There was nothing in the declaration to show that he had paid them the money of his assignees. He might have been the agent of the third person, or have had money in this colony, which was seized by means of a process of this Court.

Bartley v. *Hodges*, 1 B. & S., 375, and
Bank of Australasia v. *Nias*, 16 Q.B., 717,

show that their right was not barred by the discharge in Melbourne. The declaration did not allege that the Victorian Court had jurisdiction, which should have appeared. The next point was whether or not it was necessary, in order to give the Victorian Court jurisdiction, that Swanson should be domiciled or resident there. He was not, because it had often been held that Her Majesty's soldiers, who were bound to go anywhere, were not domiciled by the fact of residence at a certain place. It was laid down as a general proposition of law that a man could be sued wherever he could be caught, and a man being temporarily here could be sued; but it was a question whether in passing through he could be arrested, and whether the Court would not, if applied to on *habeas*, discharge him—

Alexander v. *Vaughan*, Cowp., 398.

But the strongest argument of all is, that the declaration shows no title in plaintiff to sue. The property has been sequestrated into the hands of the Chief Commissioner, and then in accordance with the law of Victoria, the Supreme Court appointed a Receiver to receive this money. What right had he to sue? It is certain that no Receiver appointed by the Court of Chancery has any authority to sue, and there is no allegation that it was the law of Victoria that the person appointed Receiver in this case had the right to sue for the money.

Sw, *Q.C.*, for the plaintiff.—A number of the defendants'

points are founded on the absence or supposed absence of any specific allegation that Mr. Swanson was a person who could be made insolvent in the Colony of Victoria, that he and Messrs. Macgeorge & Co. were within the jurisdiction of the Victorian Courts. Assuming that were necessary, everything would be presumed to have been done by a foreign Court, as it would by a domestic Court, in accordance with and not contrary to the law it had to administer. The argument that Swanson was not a person who could be made insolvent in Victoria proceeded upon the erroneous application of the principle in certain matters that domicile was to be the guide. As regarded the disposal of property after death and in some other circumstances, the domicile of the person was to be considered; but even then the Court of any other country had jurisdiction over any property that was in it, and would assume that jurisdiction, though as regarded the mode in which it should be distributed, the law of the domicile would prevail. There is nothing which takes away the prerogative of the Sovereign of every State to deal with all persons and with all property within its jurisdiction, wherever those persons or the owners of such property might be domiciled. Wherever a person was, during the time he remained he owed allegiance to the laws of that country, and the question of domicile had no bearing on it whatever. (GWYNNE, J.—There appears from the declaration to be two species of sequestration, one merely temporary and the other a more formal sequestration for the benefit of the creditors, and I do not see clearly in whom the property was vested.) This was not an action brought to recover money by law vested in the assignees, but an action founded upon a legal duty imposed upon one person, who had done a certain act to pay to another person a particular sum of money, which he had to hold on trust for the creditors. The defendant did what the law emphatically forbid; the law said in effect that any sum of money paid as unauthorised in the Act should be repaid to the nominee of the Court for the benefit of the creditors. He was in fact, so far as that sum of money, made a trustee on behalf of the creditors. Another answer to the objection to the jurisdiction of the Court of Victoria is, that the defendants have taken steps to avail themselves of the benefit of the Victorian law, and in doing so they took upon

themselves all the liabilities which might be imposed by virtue of that action. Though they withdrew, the Court might make an order against them for costs, and it could not be doubted that those costs would be recoverable from them even in the Court of another country, on the ground that they had submitted themselves to the jurisdiction. The cases show that a man can sue upon the judgment of a foreign Court—

Henderson v. *Henderson*, 6 Q.B., 288
Robertson v. *Struth*, 5 Q.B., 941.

In reference to the title of the plaintiff, he sued in the capacity of the person appointed by the Court to whom the money should be paid. It was just the same as the decree of a foreign country. The Courts in England on seeing the decree would presume it was rightly made, and would not enquire whether the money was due or not, but order it to be paid as the decree directed.

Way was about to follow on the same side, when

Ingleby objected that in demurrer but one counsel could be heard.

Way said it was a common practice for two or more counsel to address the Court, and referred to

Hutton v. *Hill*, 3 S.A. L.R., 1.

Ingleby said that the practice was only allowed where consented to.

Per curiam.—But one counsel can be heard.

Ingleby, in reply, admitted that if the suit was between the same parties as in Victoria, it would be necessary to meet any defect of jurisdiction by plea ; but that did not apply to the defendant, who it was not contended had any notice of the proceedings in the Melbourne Court. There was no pretence that there was an order upon Macgeorge & Co. to pay the money to the plaintiff. If it

were a decree against them, he would not argue that they were not bound to pay it; but it was a mere matter of procedure—

Stevenson v. *Newnham*, 13 C. B., 285.

It was merely giving the plaintiff a power, not imposing a duty upon the defendant. It was necessary to have some person to receive the money, and Mr. Jacomb was appointed the recipient. His position was exactly analogous to that of a person appointed Receiver by the Court of Chancery, and the other side would not contend that such a person would have a right to sue in that Court unless it appeared that by the law of Victoria such right was conferred.

Cur ad vult.

3 June—

The judgment of the Court was delivered by GWYNNE, J.—This was a demurrer to the declaration, in which is set out, as matter of fact, so much of the law of Victoria as is applicable to the plaintiff's case. The demurrer, of course, admits both the law of Victoria so set out and also the other averments in the declaration. The declaration is rather lengthy, but it will not be necessary to go very minutely into its averments to render the point raised intelligible. [His Honor here stated the facts before set forth.] The principal question raised by the demurrer is—Does the declaration show any right of action vested in the plaintiff to recover the £200 so wrongfully paid to Macgeorge? On the part of the plaintiff, it was urged that by the effect of the law of Victoria, and the order of the 21st day of May, 1868, a duty was imposed on the defendants to repay the money to the plaintiff, and that the law would imply an undertaking on their part to do so. But we cannot assent to that view. It is not pretended that by the law of Victoria as set out in the declaration (and which is all we can know of that law), that any express right of suing is vested in the plaintiff. It is not the case of a common informer, or a party aggrieved having a right of suit by Statute; it is the case of a person being the appointee of a Court of Record to receive a sum of money, and incidentally to give a receipt for the same, dis-

charging the payee. In 1 Comyn's Digest (F) it is laid down—"So in every case when a Statute enacts or prohibits a thing for the benefit of a person, he shall have a remedy upon the same Statute for the thing enacted for his advantage or for the recompense of a wrong done to him contrary to the said law." In our opinion, however, the plaintiff is not within the principle above enunciated. To whom did the defendants owe the duty to pay before the order of 21st May, 1868, was made? Certainly not to the plaintiff. It appears to us that it was to the Court, and that appointing the plaintiff to receive the money, although a necessary step to ground the proceeding for an attachment, it did not change the direction of the defendants' duty. The only right or authority in the matter vested in the plaintiff was by the effect of the order of 21st May, 1868, but no action lies on a Judge's order or a rule of Court for the payment of money. See *Carpenter* v. *Thornton*, 3 B. & A., 52; *Dent* v. *Basham*, 9 Exch., 469; and *Hookpayton* v. *Bussell*, 10 Exch., 24. For the above reasons, we are of opinion that the demurrer must be upheld.

Demurrer upheld.

HANSON, C.J., GWYNNE, J., WEARING, J.] [COMMON LAW.

3 AND 9 JUNE, 1870.

RE MCCALMAN AND THE ADELAIDE LICENSING BENCH.

MANDAMUS.—Licensed Victuallers Act, 1869-70—*Application for Licence.*

Where a time certain is fixed by a Statute for the doing a judicial act by an inferior tribunal, and the tribunal appointed to do such Act refuses at such time to exercise its jurisdiction, mandamus *will not lie to compel it to do so.*

The Licensing Bench for the Adelaide District, under the Licensed Victuallers Act, 1869-70, *having refused at its annual meeting to hear an application for a licence,*

Held—*That* mandamus *would not go to compel it to hear the application, because its jurisdiction could only be exercised on the days fixed by the Act.*

The words "housekeepers residing in the district wherein the intended premises are situate" in Clause 20, apply to housekeepers residing within the Licensing District, and not to those living in the immediate neighbourhood.

AT the general meeting of the Adelaide Licensing Bench, McCalman applied for a publican's licence for the "Reservoir Hotel," and accompanying his application was a housekeeper's certificate, signed by three housekeepers residing within the Adelaide Licensing District, but not residing within the immediate neighbourhood of the house proposed to be licensed. The Bench refused to hear the application, on the ground that the certificate was not signed by persons resident within the district where the said hotel was situated.

A rule *nisi* was granted, calling upon the Bench to show cause why a *mandamus* should not issue to compel them to hear the application. The following are the sections of the Act upon which the question depended :—

"14. The Governor may, by order in Council, to be published in the *Gazette* from time to time, declare that the area in such Order mentioned shall constitute a Licensing District as in such Order shall be declared, and in any such Order may define the boundaries of any such districts and such boundaries from time to time to alter and vary, and in such Order shall be mentioned the day from which such Order shall take effect; and it shall also be lawful for the Governor from time to time, by Order in Council, to nominate and appoint a Licensing Bench for each such district, and to fix the days for the annual and quarterly meetings of such Bench, which shall consist of not less than three nor more than nine Justices of the Peace for the said Province, three of whom shall be a quorum, with power, by Order as aforesaid, to vary and alter from time to time the members constituting such Bench. The Governor in Council may from time to time appoint and remove a clerk to each Licensing Bench, who shall give such security for good behaviour as the Governor in Council shall from time to time direct."

"16. General meetings of the Licensing Benches shall be holden respectively at such places as may from time to time be appointed by the Governor in Council for that purpose, on the second Monday in March in every year, unless otherwise fixed, as hereinbefore mentioned, for the consideration of applications for publicans', storekeepers', or wine licences, which may respectively be adjourned for any time that may appear to be necessary; but decisions as to granting licences shall not be given on any other than original or adjournment days, and when the Licensing Benches are assembled for the consideration of applications as aforesaid, and meetings of the Licensing Benches shall also be holden at such places as aforesaid on the second Monday in the months of June, September, and

December in every year, unless otherwise fixed, as hereinbefore mentioned, for the consideration of applications for permission to transfer existing publicans', storekeepers', or wine licences, and of applications for the issue of such licences for new premises, which meetings may be adjourned as the Licensing Benches find necessary: Provided that such Licensing Benches, so assembled at such quarterly meeting, shall not have power or authority to receive or consider any application rejected at the preceding annual meeting or at any preceding quarterly meeting, or to grant any licence under this Act to any person or premises in respect of which a licence shall have been refused at such annual or preceding quarterly meeting, except when the Licensing Benches assembled at such annual or preceding quarterly meeting shall have given permission to the applicant to renew his application, or to prefer a new application, in respect of new or other premises at such quarterly meeting."

"20. Every person desirous of procuring a publican's, storekeeper's or wine licence, under this Act, shall, twenty-eight days before the date of such meeting, post on the outer door of the premises proposed to be licensed a written notice in the form contained in Schedule A, as the case may be, and shall deliver to the Clerk of the Licensing Bench for the district written notices in the forms, as the case may be, contained in Schedule A, accompanied by a certificate of at least three known housekeepers residing in the district wherein the intended premises are situated and in the form described in Schedule B." . . . . .

Stow, Q.C., showed cause.—The affidavits do not show that the persons mentioned in the rule are the Licensing Bench for the Adelaide District, nor do they show what Justices took part in the act complained of—

Tapping on *Mandamus*, 234, 414, 29, 14.

The Court will not grant a *mandamus* where a licence has been refused, because it is in the Justices' discretion to refuse it or otherwise—

King v. *Justices of Farringdon*, 4 D. & R., 735;
Reg. v. *Sillifant*, 5 N. & M., 643
Reg. v. *Wilts*, J.J. 10 East, 405.

and the Court will not grant a *mandamus* to the Bench to do what they have not power to do. The Justices have no power to entertain applications for licence except at the annual meetings, or (if leave is reserved at such annual meeting) at their quarterly meetings. Here the Bench at their annual meeting refuse the licence, and the day appointed having passed, have no power to exercise jurisdiction until the day fixed for the annual meeting—

Rex v. *Justices of Surrey*, 5 D. & R., 308
Reg. v. *Justices of West Riding*, 5 L. R., Q.B., 33.

Ingleby and *J. Downer*, in reply.—The publication of Order in Council in the *Gazette* is proof of the persons constituting the Licensing Bench—

Taylor on Evidence, p. 15.

In regard to the power of the Bench to rehear the application, if the Justices had heard the application, and not decided it upon a preliminary point, the Court could not have been asked to grant a *mandamus*. But in Drake's case, 5 L.R., Q.B., 33, where the application was not heard, but rejected on account of a preliminary objection, a *mandamus* it was held should issue. There was nothing to prevent the Bench absolutely refusing an application if they liked for grounds within their own personal knowledge; but if they undertook to decide it upon a preliminary point, and they were mistaken, then it was the duty of the Court to step in and correct them. (GWYNNE, J.—Assuming that the Justices decided this upon the ground that "district" meant neighbourhood, and that the certificate, consequently, was not in compliance with the Act, it follows that they had no power to have heard the application upon its merits.) That was the holding of the Bench. If the argument on behalf of the Justices be correct, it will follow that whenever a time is fixed for the doing of a judicial Act by an inferior tribunal, such tribunal can, by refusing to perform its duty at the proper time, for ever prevent the act being done. The Bench could refuse to hear any application at its annual meeting, and could thus prevent every house in the province being licensed for a whole year. Every judicial Act must be exercised at a time certain, and the prerogative writ is to compel its due exercise. In *Rex* v. *Surrey* Justices the application was made to the Justices after the proper time (not as in this case at the proper time), and the Court held that the Justices rightly refused. Here it is conceded they wrongly refused. See also

Rex v. *Mayor of Thetford*, 8 East, 270,

where the duty was to be performed within a certain time, and the duty not being so done, *mandamus* went to compel it.

Cur. ad. vult.

9 June—

The judgment of the Court was now delivered by HANSON, C.J.—In this case a rule has been obtained to show cause why a *mandamus* should not issue to the Licensing Bench in the District of Adelaide, commanding them to hear the application of McCalman for a publican's licence, against which cause has been shown, and we are of opinion that the rule must be discharged. We have no doubt that the construction which, from the affidavit in support of the rule, appears to have been placed by the Chairman of the Licensing Bench upon the words in clause 20 of the Licensed Victuallers Act, 1869-70, "housekeepers residing in the district wherein the intended premises are situate," is erroneous, and those words are only intended to provide that such housekeepers shall reside within the licensing district. It is not denied that this erroneous construction was the ground of the refusal of the Bench to entertain the application. We therefore think that it was their duty to have heard and decided the application upon its merits, and that the applicant would be entitled to the intervention of this Court if we could intervene with effect. Looking at clause 16, however, it appears to us that the Licensing Bench can only exercise the functions which we are asked to command them to exercise at a meeting held on the second Monday in March, or upon some adjournment day. In the present case there was no adjournment, so that the jurisdiction of the Bench is at an end, and therefore, on the authority of *Rex* v. *Justices of Surrey*, cited from D. & R., we have no power to issue a *mandamus*. In the course of the argument the present case was attempted to be assimilated to those cases in which the Court of Queen's Bench has directed the Court of Quarter Sessions to enter continuances, but it seems to us that the assumed analogy does not exist. Continuances are entered upon the record, which may be made at any time, and which in practice are seldom entered until it becomes necessary to make up the record, while an adjournment is an act of the Bench which must be performed at the meeting intended to be adjourned. The Magistrates consequently could not do what we are required to command them to do. The rule therefore will be discharged; but as we think the applicant has been injured by the action of the Licensing Bench, and as we are only prevented by a technical

obstacle from giving him the relief he seeks, it will be discharged without costs.

Rule discharged.

GWYNNE, J., WEARING, J.] [COMMON LAW.

24 MARCH AND 9 MAY, 1870.

DAVENPORT v. MUGGE.

TRESPASS.—Boundary—Survey Pegs—Land Grant.

A land grant conveyed to A section "numbered 1002 *in the provincial survey marked with the letter B." The defendant erected a fence on the boundary of the section according to the pegs of the Government Surveyor, from which survey B should have been prepared; but survey B, it was alleged, incorrectly showed the line made by the pegs as being on section "*1001*" instead of the boundary between sections* 1002 *and* 1001. *On trespass brought by the owners of section* 1001 *against A, by reason of the erection of the fence,*

Held—*That the grant being of the section as shown in survey B, the plan must govern whether correct or not.*

Proof of admissions by the plaintiff of the defendant's title to land are no evidence to go to the jury in support of the plea of liberum tenementum.

THIS action was trespass, the *locus in quo* being Section 1001, Hundred and County of Adelaide, and the defendant pleaded not guilty, not possessed, and *liberum tenementum*. The cause was tried before GWYNNE, J., in July, 1869, when the jury, under the direction of His Honor, found a verdict for the plaintiff with one farthing damages. The plaintiff and defendant were owners of adjoining sections, and the question in issue was the right of the plaintiff to a strip of land claimed by the defendant as portion of his section. The facts proved on the trial were, that the defendant had previously occupied the strip in dispute as part of his section 1002, but that on the plaintiff's suggestion that the boundary line of the defendant's section was incorrect, the defendant permitted the plaintiff to take possession of the strip. He was subsequently advised his original boundary line was correct, and he committed

the trespass to try the right. The contest on the trial was on the defendant's plea of *liberum tenementum*. The defendant proved his land grant in which the section was thus described:—"All "that section of land containing 90 acres, be the same little more "or less, and numbered 1002 in the provincial survey marked with "the letter B and delineated in the plan drawn in the margin hereof." A plan was produced from the Land Office as being the plan referred to in the land grant, and the witness who produced it said he could nearly point out the north boundary of section 1002, but he could not fix its exact position, as the survey had not been made from a trig station, and the map was old and worn and on too small a scale—two inches to the mile. A number of surveyors and other witnesses who had known the land in the early days of the colony were examined on behalf of the defendant, to show that the fence which he had pulled down was within the boundary of his section 1002, as originally occupied and as marked out by the surveyor's pegs and trenches. On behalf of the plaintiff it was contended that map survey B showed that the line forming the boundary between sections 1001 and 1002 was a continuation of the road from Glenelg to Glen Osmond, and that such is the case if the plaintiff's present fence were produced—it would coincide with northern line of the Glenelg Road.

A rule *nisi* for a new trial having been obtained,

Stow, Q.C., for the plaintiff, showed cause.—The plan which in contemplation of law formed part of the land grant showed that the boundary line in dispute was a production of the northern line of the road which ran from near Glenelg to Glen Osmond; and no evidence of pegs or fences could avail the defendant to prove that which he had to prove—namely, that the plaintiff's fence was within his (the defendant's) boundary. That could only be done by refernce to the plan.

Andrews, Q.C., and *Ingleby*, in reply.—The evidence shows that at the time the *locus in quo* was surveyed there were no trigonometrical points; the defendant could only produce evidence of seven persons who had seen the pegs and the scientific evidence of surveyors from the Surveyor's office, to show that the boundaries

indicated by these pegs were those ascertained by them, and relied upon in plotting fresh sections on to the earlier part of the survey. If the fences were not up, until the pegs had been ascertained there would be no road established. It was necessary to find the pegs to ascertain where the road was. The simple fact of its being in a straight line did not show that it was in a right position. That must depend upon scientific evidence, or proof of the original survey-pegs, and whether the evidence was sufficient was a matter for the jury. His Honor told the jury there was no evidence whatever, and that because Mr. Gardiner from the Survey Office, when the map was put into his hand, and he was asked, "Can you go and find that place?" said, "No, I cannot," it was impossible for the defendant to prove his title. But the map was merely evidence of a survey which as a matter of fact preceded the map. That fact was illustrated by *Hutchinson* v. *Leeworthy*; and another case, in which it was shown that the survey on the ground and the public map did not correspond. If the land grant only referred to "Provincial Survey, marked B," and not, as it did to a map, there would be no room for argument. Therefore the Court would adopt that construction which would make the title to freehold clear, and not the reverse. The question for the Court was the documentary title; what took place on the ground was a question for the jury. The evidence of Mr. Townsend was that he fixed the fence according to the surveyors' marks. He might be right, or he might be wrong, but that was a question for the jury. (WEARING, J.—Do you admit it was necessary for you to give evidence of the northern boundary of the Bay-road?) Certainly not The northern boundary of the Bay-road and the peg B are the same line. The peg B proves the northern boundary of the Bay-road, and the Bay-road does not prove point B. (WEARING, J.—This weighs with me, that there is no evidence with regard to the inception of the survey. As I understand, Townsend saw some surveyors come over the hill.) They had surveyors' instruments, and he saw the peg put down. It would be for the jury to say whether they believed that. The surveyor is dead.

Cur. ad. vult.

9 May—

WEARING, J., delivered the following judgment:—This was an action of trespass to the realty tried before my learned colleague the Acting Chief Justice, when by His Honor's direction a verdict, with nominal damages, was entered for the plaintiff. Subsequently, a rule *nisi* for a new trial was obtained on the general grounds of misdirection, improper reception of evidence, and that the verdict was against the weight of evidence. To the plaintiff's declaration there were three pleas; but the sole contest arose on the third. That plea alleges that the land on which the pretended trespass was committed was then the freehold of the defendant. The parties to the controversy at the time the action was brought were coterminous proprietors—the plaintiff owning section numbered 1001, and the defendant owning section 1002, each in the Hundred of Adelaide. The action was brought to determine the position of the line constituting respectively the plaintiff's southern and the defendant's northern boundary. The plaintiff relied, as he was entitled to do, simply upon possession of the land in dispute. The defendant undertook to establish his title to the freehold, and in support of his plea he produced a land grant of the section from George Grey, Esq., Governor and Resident Commissioner, to John Horsnell, dated the 26th January, 1843. He also put in other deeds by which his later title was deduced. In determining, therefore, the defendant's rights, he must first have recourse to Horsnell's land grant. It purports to convey "all that section of land containing 90 acres, and numbered 1002 in the Provincial Survey marked with the letter B, and delineated in the margin hereof." There is a diagram in the margin of the land grant. It shows a boundary line separating sections 1001 and 1002, which line is a continuation of one constituting the northern side of a public road. But as the description in the land grant refers to Survey B, the map of Survey B must have been examined; and accordingly at the trial the map was produced from the offices of the Surveyor-General. That map shows a line dividing the two sections precisely as shown in the diagram in the land grant. In both it is a line being an extension of the northern boundary of a public road. Other evidence proved that the public road described respectively in the diagram and in the map is a thoroughfare

known as "The Glenelg Road." This was the documentary evidence of the defendant, but he refused to be bound by it, and, in effect, to contradict it, he examined several witnesses, the tendency of whose testimony was to establish the fact that since the date of the land grant a post-and-rail fence had been erected, which showed the defendant's boundary to be further north than the line above mentioned. My learned colleague was of opinion that this latter evidence was inadmissible, inasmuch as the rights of the parties must be decided by reference solely to the documentary evidence, which indicated the boundary-line as being an extension of the northern side of the Glenelg Road. In this opinion I fully concur. It was contended by the learned counsel for the defendant that "parcel or no parcel" is a question for the jury. This I admit. But the Judge is bound to explain to the jurymen for their guidance what is the true construction of any documents necessary for deciding the question "parcel or no parcel." Here the description of the parcels was sent out in the land grant, aided by reference to the map of survey B. It became, therefore, the Judge's duty to decide what was the true meaning of the language of the land grant, as describing the boundaries of the section. He was bound to tell them that the boundary was a line being an extension of the northern side of the Glenelg Road, however that description might conflict with the evidence. I concede that to adapt the description of a boundary-line contained in a land grant or other instrument (whether expressed by words or by diagram) to the line in nature meant to be designated by the description, it may be necessary often to have recourse to parol evidence. For instance, here, if it had been uncertain whether the public road shown in the diagram and map was or was not the Glenelg Road, or whether the fence was or was not in a line with the Glenelg Road, the jury ought to have been appealed to. But as to neither of these questions I understand was there any dispute. The defendant it appears, refused to be bound by either diagram or map, relying altogether upon extrinsic evidence. In this, I think he was wrong. This view is supported by a decision of the House of Lords—*Lyle* v. *Richards* (1 L.R., English and Irish Appeals, 222). We are therefore of opinion that the verdict was right, and that this rule must be discharged.

GWYNNE, J., said—The defendant having pleaded that the *locus in quo* was his freehold, the absolute *onus* of proving that was upon him, and he was bound to prove it with all technical accuracy and certainty. To do so he put in a certificate of title under the Real Property Act. That certificate of title referred to a land grant, and that it appeared to him was only part of the deed, because it referred to a map called Survey B, which constituted almost the only certainty in the subject-matter of the defence. Taking upon himself to prove what the defendant should have proved for him, he asked Mr. Gardiner, an officer in the Land Office (reading the land grant) to hand him that document, when he handed him a certain map, which he said had been in the office a long time, and was always known and recognised as Provincial Survey marked B. Then it appeared to him the deed was proved in its entirety, and it showed the boundary between the plaintiff's and the defendant's sections. It showed a mathematical demonstration that it was a continuation of a straight line, which straight line formed the northern side of a certain road called the Glenelg Road. That was shown beyond question. Under those circumstances it was incumbent upon the defendant, having undertaken to prove that the *locus in quo* was his freehold, to prove that the fence he pulled down was not a continuation of that line, but was on his side of it. So far from doing that the defence was conducted on the basis of that having nothing to do with the question, but that possession was taken by Townsend, who saw two men with surveying instruments in their hands come down the hill, and who said they pointed out the boundary line of the two sections. (*Andrews*—"Put down the pegs.") Assuming that what Mr. Townsend said was true, and that they were persons sent out by the Survey Office, of which there was no proof, that Townsend put up the boundary fence in a different site to that which Mr. Davenport claimed, and that had been the boundary for many years, it was insisted that this Townsend's fence was the boundary, and not the one Mr. Davenport put up. But it appeared to him, where there was a difference between the land itself and as it was described in the contract, the contract must govern, and not the act of the party in reference to the land. It appeared to him if he purchased land from the Government by deed describing it accu-

rately on the map, so that he could go and determine by scientific evidence its locality on the face of the earth, he should be entitled to that which his deed described against the world, and any mistake the Government had made in laying it out would not override it. It appeared to him Townsend's fence could not be recognised as the boundary, and that the only boundary was a prolongation of the line of the Bay-Road. If evidence had been led that Townsend's fence was a continuation of that line, he should have put it to the jury, and if they found that it was, he should have no hesitation in telling them that their verdict should be for the defendant. But the case was not put in that way, and he was of opinion that the defendant did not make out his plea of *liberum tenementum.*

Rule discharged.

GWYNNE, J., WEARING, J.] [COMMON LAW.

23 MARCH, 1870.

RE THE WILL OF J. MCKECHNIE.

THE WILLS ACT, 16 *of* 1842, *relates back to the* 1*st of January*, 1838.

THIS was an application for probate of the will of James McKechnie, deceased, by Peter McKechnie the executor. The will produced was dated Inverary, Scotland, 12th May, 1841, was signed by the testator, but the signature was unattested. The affidavit of Peter McKechnie showed that the testator was born and domiciled in Scotland and that he left in 1848 for South Australia, and died at Franklin Harbour on the 12th October, 1869. The signature to the will was proved by R. B. Smith and Jos. Howard. The Wills Act 16, of 1842, after reciting the Imperial Wills Act, 7 Will. IV. and 1 Vict., c. 26, provides that "every clause and provision in the said recited Act shall on from and after the said first day of August have only the same effect in the province of South Australia as the same would have had in Her Majesty's Kingdom of England,

from and after the first day of January, 1838." The question which arose was, whether the will, being unattested, but dealing only with personalty, was sufficient.

Hardy for applicant.—

Lovelass on Wills, 161
Worthington, 3 Ed., 505
Manly v. *Lakin*, 1 Hag., 130
Lemayne v. *Stanley*, 3 Levins, 1

show that before the 1st January, 1838, witnesses were not requisite to the validity of a will of personalty. (GWYNNE, J.—No doubt the will would be sufficient, irrespective of the Wills Act. There is no doubt the testator was originally domiciled in Scotland; but what would govern the distribution of his estate would be the law of the place where he was domiciled at the time of his death.) By a later English Act, the will would be construed according to the law of the place where the testator was domiciled. The Wills Act came into operation in England on the 1st January, 1838; but it was not until 1842 that that law was adopted in South Australia; therefore the law of South Australia on the 12th May, 1841, was clearly that a will of personalty alone, being in the handwriting of the testator, was valid, though there was no attesting witness. (GWYNNE, J.—By the Act No. 16 of 1842 the Legislature of South Australia seemed to have assumed that the English Wills Act had two different effects. They said the English Act should not commence or take effect before the 1st August, 1842; but at the same time, it said that every clause and provision of the English Act was adopted, and should have the same effect in the province of South Australia as the same would have had in Her Majesty's Kingdom of England from and after the 1st January, 1838. Therefore it was the law of South Australia that the Wills Act should not extend to any will made before the first January, 1838. Mr. McKechnie's will was made in 1841, therefore the Wills Act did extend to it.) It was a valid will at the time our Act was passed. (GWYNNE, J.—But the Legislature have ignorantly, or most extraordinarily, assumed that the English Statute had two different effects. I don't see how they

could have assumed anything so false and absurd. I am afraid there is a miscarriage of justice.) It would not be the only instance of carelessness in the adoption of English Acts. The Court has the power of saying what the intention of the Act is.

GWYNNE, J.—But here it says emphatically "every clause and provision in the said recited Act shall on, from, and after the said 1st day of August have only the same effect in the Province of South Australia as the same would have had in Her Majesty's Kingdom of England, from and after the 1st day of January, 1838." and the 34th section of the Imperial Act contains these words, "This Act shall not extend to any will made before the first day of January, 1838." Well, what was the effect that it had in England on the 1st January, 1838? Why the same effect that it had all along.

WEARING, J.—I think the proper course is legislative action in reference to it, because it may affect a great number of persons' property. I know the general impression has been that the Wills Act came into operation here on the 1st August, 1842, and no doubt a great deal of property has passed upon that construction of it.

GWYNNE, J., PRIMARY JUDGE.] [EQUITY.

23 MAY, 1870.

ENGLAND v. HAYNES ET UXOR.

REHEARING.—Costs.

Where, on a rehearing, the original decree is reversed, the party ultimately unsuccessful must pay all the costs of the original, as well as of the rehearing.

THIS was a case in which a decree, pronounced by the Supreme Court in April, 1867, in favour of the plaintiff, had upon a rehearing been reversed by the Primary Judge. It was urged on behalf of the successful parties that they were entitled to costs of the original hearing as if the motion for decree had been refused with costs, and also to the costs of rehearing.

Belt, for the plaintiff, contended that the costs were occasioned

through the Court making an unauthorised decree. It was to be regarded the same as a misdirection at Common Law, and that the plaintiff would not be visited with the costs so occasioned.

GWYNNE, J.—Decided that the plaintiff must pay all costs, as well of the original hearing as of the rehearing.

HANSON, C.J., GWYNNE, J., WEARING, J.] [COMMON LAW.

7 JUNE, 1870.

GOODS AND OTHERS, APPELLANTS, v. HELLYER, RESPONDENT.

EVIDENCE ACT, 2 of 1852.—Prisoners—Joint Indictment.

Persons jointly indicted cannot give evidence for or against each other.

THIS was a case reserved by the Adelaide Local Court, on appeal against a conviction of Mr. C. G. Doughty, of Mount Gambier. The ground of appeal was the refusal of the Magistrate to allow one of the defendants to give evidence for the others. The defendants were tried at the same time on a joint information for assault and were severally convicted.

The question turned upon the construction of s. 3 of Act No. 2 of 1852—"An Act to amend the Law of Evidence"—which "provides that nothing herein contained shall render any person, "who in any criminal proceeding is charged with the commission "of any indictable offence, or any offence punishable on summary "conviction, competent or compellable to give evidence for or "against himself or herself," &c.

Boucaut for appellants.—The exception is limited to a defendant or prisoner giving evidence for or against himself, but there is nothing, where two or more persons were arraigned together, to prevent one of them giving evidence on behalf of his co-defendants,

Taylor on Evidence (Ed. 1868, p. 1178), referring to a decision of Mr. Justice Ball in Ireland (*Queen* v. *Stevenson and Coulter*)

3 Russell on Crimes and Misdemeanours, 625
Queen v. *Winsor*, L.R., 1 Q.B., 289 and 390.

The prisoner having been tried in the first case jointly with Harris, was afterwards, both having been given in charge to separate juries, put upon her trial alone, and Harris called against her before her own case had been decided. (WEARING, J.—Then there were three trials in fact—first jointly, then the second trial came on, and each prisoner was tried by a separate jury.) The Windsor case went far towards establishing the proposition he contended for; and though such evidence was admitted by the Judges to be objectionable, it was still according to law. Although it did not appear that Harris was tried at the same time, that did not matter, as they were jointly indicted and jointly given in charge. (HANSON, C. J.—What Cockburn, C. J., said was that if they had been tried together the evidence could not have been given. He says—"The plaintiff in error and Harris were both joined in one indictment, and on the first occasion were tried together. On the second it was proposed on the part of the prosecution to sever the trial, with a view to the one prisoner becoming a witness against the other." No doubt it was that state of things, which the resolution of the Judges, as reported in Lord Holt's time, was intended to prevent. It did place the prisoner under this disadvantage, that whereas upon the first trial most important evidence could not be given against her, it was given against her upon the second, so that the discharge of the jury was productive to her of that disadvantage.) (WEARING, J.—The same principle was acted upon in a case at the last Criminal Sittings in *Regina* v. *Sedgely*. If the principle contended for on behalf of the defendant were applied, it would give the Crown a great advantage against prisoners.) It would be greatly to be regretted, and, as far as he was concerned, he should be sorry to see the principle established, but he submitted the words of the Act were capable of no other construction.

Ingleby for respondent.—It was a matter which rested in the discretion of the Judge who tried the case to say whether the evidence of the prisoner, with a view of inculpating or exculpating his co-prisoners, could be given without affecting himself. In case

of two persons charged with a joint assault, there must necessarily be a joint act. The one could not be a witness on behalf of the other co-defendant without at the same time giving evidence either for or against himself. The principle was well laid down by Starkie on Evidence, and cited in 3 Russell, 626—"An accomplice as it "seems is a competent witness, and may be examined if he be "willing, although he is indicted along with the others, provided he "be not on his trial at the same time with the others."

Boucaut, in reply, maintained that the argument as to the question being in the discretion of the Judge would not apply, because the Magistrate did not exercise his discretion; and the opinion of Mr. Starkie, he imagined, was relative to the Common Law, and before the Statute on Evidence.

HANSON, C.J.—We think the question should be answered in the negative. We are asked to put a construction for the first time upon an Act which has existed for nearly eighteen years in the colony, and for a longer period in England, in opposition to all the authorities which have been cited except a single case in the Irish Reports which was decided without argument, for which no reason has been given, and which was not followed, so far as there is any evidence, either in England or Ireland. Apart from that, where persons are jointly indicted, it is almost impossible in the nature of things that any one giving evidence for the others, should not also give evidence for himself. If we felt more doubt than we do upon the point, we should be very much influenced by the consideration of the inconveniences that had been pointed out as likely to flow from the recognition of the principle contended for.

HANSON, C.J., GWYNNE, J., WEARING, J.] [COMMON LAW.

7 JUNE, 1870.

HOOKER v. MCCOY.

LOCAL COURTS ACT, 1861.—*Appeal—Amount.*

The right of a defendant to appeal under the Local Courts Act, 1861, *is tested by the amount claimed in the summons, and not by the amount of the verdict.*

Quære—*Is the rule so where plaintiff appeals?*

The Court will not hear objections by appellant that were not taken in the Court below; and where the appellant made affidavit that the point on which he was moving was taken below, but it did not appear on the notes of the Special Magistrate who tried the cause, and he stated he had no recollection of such point having been taken,

Held—*That the Court must accept the Magistrate's report, and the appeal was dismissed with costs.*

In Appeal from the Local Court of Port Adelaide.—The amount claimed was £31, and the jury had found a verdict for the plaintiff for £10.

The report of the Special Magistrate, sent up on the defendant appealing, was that he had no recollection of the points mentioned in the rule having been taken by the defendant, nor of having been asked to direct the jury in any particular way, nor of any objection having been made to his direction.

A rule to show cause why the verdict should not be set aside having been granted,

J. Downer showed cause.—Firstly, there is no appeal in this case. The Local Court Act allows appeals where the amount exceeds £30, but it is the verdict and not the summons which is the measure of the claim, and the verdict here was but £10. The English Court of Requests Act used much stronger words. There the Court had jurisdiction where the "disputes and differences" did not exceed £5, yet it was held that the verdict was the test of the dispute or difference. It was never intended that parties should be able to give themselves the right of appeal by merely claiming more than they were entitled to. Secondly, the grounds

were not taken in the Court below, and can therefore not be taken now—

Shaddick v. *Bennett*, 4 B. & C., 769
Baddiley v. *Oliver*, 1 C. & M., 219
Fairbrass v. *Pettit*, 12 Mee. and W., 455
Woodhams v. *Newman*, 7 C.B., 665.

Stow, Q.C., in support of the rule.—The plaintiff claimed £31, so that he might have the advantage of the appeal if unsuccessful, and it was the amount of the claim which gave the right. That principle was affirmed in the case of

Harris v. *Dreesman*, 3 County Court of Appeals, 10.

As to the point not having been taken, the defendant's attorney swears it was, and the Magistrate only says he has no recollection.

HANSON, C.J.—We are of opinion that in the present case the defendant must be held to have a right of appeal. The plaintiff elects whether he will bring his action in a form which will give him certain powers and privileges—amongst others the right of appeal—or whether he will bring it for a more moderate sum and deprive both parties of that right. Having elected to do the former, we think he must accept all the consequences, and that wherever a claim is made for more than £30 it carries with it a right of appeal. On the other question we must accept the statement of the Magistrate, which is that he has no recollection of his direction having been objected to. That being so, the appeal must be dismissed with costs.

Appeal dismissed with costs.

HANSON, C.J., GWYNNE, J., WEARING, J.] [COMMON LAW.

9 AND 25 JUNE, 1870.

FUTCHER v. GALL.

CONTRACT IN RESTRAINT OF TRADE.—Consideration.

A sold to B all his interest in the stock and business of an Earthenware Dealer at C, and by the same contract agreed not to engage in, or be in any way connected with the business of an Earthenware Dealer in the Province.

On action brought by A on the contract to recover the consideration money for the sale,

Held—*That the agreement above set forth was void, as being in restraint of trade, and being an inseparable portion of the consideration for the promise by B that the contract was wholly void.*

THE declaration stated that the plaintiff agreed to sell to the defendant, and the defendant to buy of him, all the plaintiff's share and interest in the stock and business of earthenware dealers theretofore carried on by the plaintiff and defendant on the premises known as Nos. 79 and 118, Rundle Street, for the sum of £6,000, to be paid as follows:—£1,500 in cash, and the balance in three several sums of £1,500 to be paid one, two, and three years respectively from the date of the said contract, and the defendant agreed to give the plaintiff bills for the last mentioned three several sums of £1,500 each, to be paid at one, two, and three years respectively, and to give the plaintiff a satisfactory guarantee for due payment, subject to the condition, and the plaintiff agreed by the said agreement with the defendant that the plaintiff would not engage in business again as an earthenware dealer, or be in any way connected with the importation or sale of earthenware, glass, or stoneware in the said province; breach, that the defendant has not paid the money, delivered the bills and guarantee, or either of them. To this declaration the defendant by his sixth plea said that the agreement declared upon was made upon the express condition that plaintiff should (in the language above set out) agree to be restrained in the exercise of his trade, and that such term and condition was and is an undue, unreasonable, and unlawful restriction of trade, and by reason thereof the agreement upon which the action is brought was and is void and of no effect.

To this plea the plaintiff demurred, and alleged for cause that the above condition is not unlawful by Statute, and being but one term of the agreement it did not render the whole agreement void and that the reasonableness or legality of the restriction is a question of law, and the restriction is not unreasonable or unlawful.

Stow, Q.C., in support of the demurrer.—In the first place, the reasonableness or unreasonableness was a question for the Court, and not for a jury, and the question would arise, whether the contract upon the facts appearing on the declaration or the pleadings was unreasonable as being in general restraint of trade. It was a general restriction if an analogy could be established between England and a new colony, but there was a distinction to be drawn between a restriction which would extend to the whole of England and a restriction extending to the whole of a new colony like this. But if the contract was good as to part, and the rest of the consideration was a condition or agreement to do something illegal, but not involving moral turpitude, the contract, except that, could be supported; although this was a general restriction to trade, still, as the subject-matter of the contract was the purchase of a large property, and as there was another consideration which might support it, the illegal condition might be rejected, and did not invalidate the contract—

Price v. *Green*, 16 M. & W., 347
Mallan v. *May*, 11 M. & W., 653
McAllen v. *Churchill*, 11 Moore, 483.

Way for defendant.—Where a part of the consideration is tainted the whole promise fails, inasmuch as the person promising has a right to the benefit of the entire consideration from which his promise flowed. That was the rule laid down in 1 Smith's Leading Cases, 330, notes to *Collins* v. *Blantern*. The substance of the decisions with regard to the illegality of the consideration is that where the promissor did not get the benefit of everything which induced him to make his promise, he was not bound by it, and that might be the case in the present instance—

Shackell v. *Rosier*, 2 Bing. N.C., 646
1 Smith's Leading Cases, 323.

Stow, Q.C., in reply.—All the cases where it has been held that illegality of one part destroyed the whole were cases in which there was a criminal act, such as in *Shackell* v. *Rosier*—the agreement to publish a libel.

Cur. ad. vult.

25 June—

HANSON, C.J.—This is a demurrer to the defendant's plea, by which he alleges that the contract sued upon by the plaintiff was made upon consideration that the plaintiff would not engage in business again as an earthenware dealer, or be in any way connected with the importation and sale of earthenware, glass, or stoneware in the said province, and that this consideration was an unlawful restriction of trade, and so the agreement founded upon it was void and of none effect. Upon the argument it was not denied by the learned counsel for the plaintiff that this consideration was illegal, but it was argued that as the illegality was not of a nature to imply any moral turpitude, and as there was independently of this illegal consideration a sufficient valid consideration for the promise capable of being carried out, the contract was untainted by the illegality, and might be sued upon by the plaintiff. And in support of this view *McAllen* v. *Churchill*, *Mallen* v. *May*, and *Price* v. *Green* were cited. But it appears to me all of these cases are clearly distinguishable from the present, and that the true principle is that stated in 1 Smith's Leading Cases, 330, that when a contract be made on several considerations, one of which is illegal, the whole promises will be void; but that when the conditions of a bond, or the covenants in an indenture (or, on the authority of *McAllen* v. *Churchill*, the promises in a part agreement) are separable, and some of them are good, those which are good may be enforced, although others are illegal. And all the cases cited on behalf of the plaintiff come within the latter part of this rule. In all of them the consideration was legal, though that which was engaged to be done for this consideration was partly illegal; but as the illegal part was capable of being separated from the legal, it was held that only that illegal part was void. That a

contract founded upon several considerations will be void if one of them is illegal, as unbecoming public policy, is fully recognized in the case of *Jones* v. *Waite*, 5 Bing., N.C.; for there the judgments both of the Court below and of the Court of Error expressed that if they had been bound so to construe the agreement declared upon as to imply that a part of the consideration was illegal in the sense of being contrary to law (the alleged illegality in that case being an engagement to pay a sum of money for the future separation of a man and his wife), the contract would have been void, and the judgment proceeded expressly upon the ground that no such consideration could be inferred from the terms of the contract. It was further argued by *Mr. Stow* that the principle for which the defendant contended would have the effect of making all similar contracts ineffectual—that they might be enforced by one party, though not by the other. This, however, would be no reason why we should refuse to give effect to a plain principle of law; and it may be doubted whether any injustice that might be thereby occasioned would be greater than that which would arise from holding a party bound to fulfil a contract, when it was impossible for him to obtain that which possibly formed the principal inducement for making it. I am therefore of opinion that judgment must be for the defendant.

GWYNNE, J.—This was a demurrer, and on the argument two questions were reserved for the consideration of the Court. Before, however, stating these questions, it is proper to premise that the action was in assumpsit. That the declaration avers that the plaintiff agreed to sell to the defendant, and the defendant to buy of him, all the plaintiff's share and interest in the stock and business of earthenware dealers theretofore carried on by the plaintiff and defendant on the premises known as Nos. 79 and 118, Rundle Street, for the sum of £6,000, to be paid as follows:—£1,500 in cash, and the balance in three several sums of £1,500 to be paid one, two, and three years respectively from the date of the said contract, and the defendant agreed to give the plaintiff bills for the last mentioned three several sums of £1,500 each, to be paid at one, two, and three years respectively, and to give the plaintiff a satisfactory guarantee for due payment, subject to the

condition, and the plaintiff agreed by the said agreement with the defendant that the plaintiff would not engage in business again as an earthenware dealer, or be in any way connected with the importation or sale of earthenware, glass, or stoneware in the said province averment of conditions precedent; breach, that the defendant has not paid the money, delivered the bills or guarantee, or either of them. To this declaration the defendant by his sixth plea said that the agreement declared upon was made upon the express condition that plaintiff should (in the language above set out) agree to be restrained in the exercise of his trade, and that such term and condition was and is an undue, unreasonable, and unlawful restriction of trade, and by reason thereof the agreement upon which the action is brought was and is void and of no effect. To this plea the plaintiff demurred, and alleged for cause that the above condition is not unlawful by Statute, and being but one term of the agreement it does not render the whole agreement void; and that the reasonableness or legality of the restriction is a question of law, and the restriction is not unreasonable nor unlawful. The first question raised upon this record was as to the legality of the agreement declared on; and I am of opinion that it was illegal. The law upon this subject has been settled by a long series of decisions from *Mitchell* v. *Reynolds*, 1 P.W., 181, down to the present day—namely, that an agreement for a partial and associated restraint of trade upon an adequate consideration is binding, but that an agreement for general restraint is illegal. In *Horner* v. *Graves*, 7 Bing., 735, the Chief Justice, in delivering judgment, observes :—" We do not see how a better test can be applied to the question, whether reasonable or not, than by considering whether the restraint is such only as to afford a fair protection to the interests of the party in favour of whom it is given, and not so large as to interfere with the interests of the public. Whatever restraint is larger than the necessary protection of the party can be of no benefit to either. It can only be oppressive; and, if oppressive, it is in the eye of the law unreasonable. Whatever is injurious to the interests of the public is void on the grounds of public policy." Now, applying that test to the case before the Court, I have no doubt the agreement set out in the declaration is unreasonable and therefore void. The restraint

is over the whole province of South Australia. How could the defendant be injured in his business of an earthenware dealer in Adelaide by the plaintiff carrying on a similar business in the Northern Territory? The second point taken by *Mr. Stow* in support of the demurrer was, that the objectionable stipulation could be rejected as being frivolous and insufficient; but it appears to me that could only be upon the condition that it was not illegal also. The principle of public policy, observes Chitty in his Book on Contracts (quoting Lord Mansfield), is this—*ex dolo malo non oritur actio.* No Court will lend its aid to a man who founds his cause of action upon an immoral or illegal act. If from the plaintiff's own stating or otherwise, the cause of action appears to aim *ex turpi causa,* or the transgression of a positive law of this country, then the Court says he has no right to be assisted. In declaring upon an agreement, whether under seal or not, it is sufficient to state so much of each as constitutes that contract, the breach of which is complained of, prescribing the duty to be performed, and the time, manner, and other circumstances of its performance, with this difference only, that in cases of agreement not under seal the consideration must be stated, and no part of the entire consideration for any promise contained in the agreement can be omitted. See *Clark* v. *Gray and Others,* 6 East. All the cases cited by *Mr. Stow* are in strict conformity with the above rule. *Chesman* v. *Nainy,* 2 Lord Raymond, p. 1456; *Mallen* v. *May,* 11 M. & W., 653; and *Price* v. *Green,* 16 M. & W., 346, were all actions founded on specialities, and in which the good part was deemed separable from and not dependent on the illegal part. No doubt *McAllen* v. *Churchill,* 11 Moore, p. 483, was in assumpsit, but we are expressly told the judgment of the Court (after referring to the above rule) proceeds thus:—"And it appears to me that the consideration in this case was sufficiently stated. The clause in question (which was undoubtedly illegal, as being in general restraint of law) is a superadded or independent clause; it forms no essential part of the consideration." Can it be said that the stipulation between the plaintiff and the defendant, set out in the declaration "that the plaintiff would not engage in business again as an earthenware dealer, or be in any way connected with the importation or sale of earthenware, glass,

or stoneware in the said province" forms no part of the consideration for the defendant's promise? If the plaintiff had thought so, why did he not omit it from his declaration? It is to me clear beyond doubt that the defendant's promise was induced in part by an illegal consideration, and it so appears upon the face of the declaration, and that therefore the defendant's promise is void. *Featherstone* v. *Hutchison*, Cro. Eliz., 169; *Waite* v. *Jones*, 1 Bing., N.C., 662; *Shackell* v. *Rosier*, 2 Bing., N.C., 646. Our attention was called to the distinction which has been taken between covenants and conditions void by common law, and those that are void by Statute, but it does not appear that anything turns upon that distinction in the present case. I need scarcely add that the latter part of the sixth plea is bad. It attempts to leave matters of law—the reasonableness or otherwise of the contract—to the jury. On the whole record, however, I am of opinion that defendant is entitled to the judgment of the Court.

WEARING, J., concurred.

Demurrer overruled.

HANSON, C.J., GWYNNE, J., WEARING, J.] [INSOLVENCY.

5 JULY, 1870.

RE MILBANK, INSOLVENT, AND THE PETITION OF C. FENN.

PETITIONING CREDITOR.—Costs—Solicitor.

The solicitor for the petitioning creditor has no power to petition for the payment of the petitioning creditor's costs, the proper person being the petitioning creditor himself.

THIS was an appeal from the decision of the Commissioner of Insolvency refusing to make an order for the payment by the Official Assignee of £22 2s., costs due to the petitioner as solicitor to the petitioning creditor.

Way, for the Official Assignee, took a preliminary objection that under the Insolvent Act. 1860, s. 70, the person entitled to the

payment of costs was the petitioning creditor and not his solicitor and the petition should have been by him—

Deacon on Bankruptcy, 764
Exparte Cooper, 2 M.D. and De Gex., 420.

Stow, Q.C., for appellant.—In practice it is the solicitor who petitions, and in *exparte* Benson, 2 M. & Ayr., R. 582, he was held to be the person entitled to petition.

Way, in reply.—In *exparte* Benson, the Court asked the assignees if they thought it advisable to press the objection, the effect of which would be to refer the matter back to the petitioning creditor to join and so cause further expense, and on this the assignees abandoned the point. That case is, therefore, no authority, or if any, is one for the respondent.

Per Curiam.—There is no doubt about the principle. The petitioning creditor must be made a party.

HANSON, C.J., GWYNNE, J., WEARING, J.] [COMMON LAW.

5 JULY, 1870.

TONKIN v. FLEMING.

CORPORATION.—By-Law—Main Roads.

A Corporation by-law made it unlawful to drive any cart, &c., laden or returning from having been laden, through the corporate limits on Sunday. The defendant, who did not live within the corporation, drove a wagon, laden on a Sunday, over a high road that passed through the township. On conviction under the by-law and appeal,

Held—*That the Corporation had no power by by-law to stop a high road, and that the conviction was bad.*

THIS was a case stated for the opinion of the Supreme Court by Justices at Strathalbyn. The facts were that defendant, a driver in the employ of C. R. Darton & Co., of Adelaide, had driven a laden wagon on a Sunday from Adelaide over the main line of

road that runs through the township of Strathalbyn. A by-law of the Strathalbyn Corporation provides :—"It shall not be lawful for any person to open any house, shop, store, or warehouse, or any other place in the said town, or permit or suffer the same to be opened on Sunday for the purpose of trading (works of necessity and charity only excepted), or to drive any cart, wagon, or vehicle of any kind whatsoever, or permit or suffer the same to be driven by horses, mules, or oxen, either laden or returning from having been laden with any produce or merchandise of any kind of description whatsoever, and all persons offending against the provisions of this By-law shall forfeit and pay for every such offence a sum of not less than ten shillings and not exceeding £1" On information against the defendant, the Justices convicted under this By-law.

Ingleby, for the appellant.—The 147th clause of the Corporation Act, No. 16 of 1861, gives the Corporations power to make By-laws, provided they should be laid before Parliament for fourteen days prior to being submitted to the Governor for confirmation; and that they should not be repugnant to the general spirit and intendment of the laws in force within the province. The Schedule K, referred to in the 146th clause, showed that they might make *inter alia* By-laws for the better observance of Sundays. (HANSON, C.J. —Assuming the By-law to be good, does it apply to persons from a distance, who perhaps never heard of it, passing through the town?)—I don't think it does, and I am not aware that a person merely passing through a town is presumed to know the By-laws of the Municipality.

HANSON, C.J.—I can understand if a person is found in a place off the high road, where he might be presumed to be either going to or returning from a township, that in such case the By-law might be sufficient, but I don't think a Corporation can have jurisdiction by any By-law to stop up the high road. I must say, without expressing any opinion as to what its effect would be if applied to persons living within the Corporation driving merchandize to or from their places of business, that I think the By-law cannot operate to stop up the public highway on Sunday.

GWYNNE, J.—That is my opinion, and it will be seen there is a

great distinction. If a person, for instance, is loading dung on his premises and taking it out to his field on Sunday, that is a breaking of the Sabbath, which is notorious, and liable to affect the young people of the neighbourhood. But a carrier, who lives in Adelaide, passing through is not the same description of violation. The By-laws of the municipality are directed mainly, if not entirely, to the inhabitants of the territory over which the Corporation exercise *quasi* legislative powers; and I quite agree with the Chief Justice that even assuming the By-law to be good of which there may be some doubt, it does not apply to the defendant in this case.

WEARING, J.—I can certainly go as far as that, and should be disposed to go further, but it is not necessary.

Appeal allowed.

GWYNNE, J., WEARING, J.] [COMMON LAW.

29 MARCH AND 19 JULY, 1870.

SANDERS v. WADHAM.

EJECTMENT.—Real Property Act, 1861—*Condition—Entry.*

A memorandum of lease under the Real Property Act, 1861, *provided that the lessee should hold for a certain term, "subject however to the following covenants, conditions, and restrictions in addition to those implied by the Act." The covenants, &c., set out, were to pay rates, to repair, and not to sub-let without consent. On ejectment brought for under-letting,*

Held—1. *That the stipulation as to sub-letting was a covenant, and not a condition.*

2. *That ejectment would not lie under s.* 50 *of the Real Property Act of* 1861, *it not being in the nature of things a covenant in respect of which default could be continued for six months.*

Semble—*That clause* 124 *of Real Property Act of* 1861, *s.* 3, *would not prevent ejectment for a common law forfeiture of the term.*

THIS action, which was in ejectment, had been tried at the Civil Sittings, June, 1869, before GWYNNE J., and a verdict found for the plaintiff. The plaintiff claimed by virtue of a forfeiture, under a

memoradum of lease made under the Real Property Act, 1861. The lease was for a term of seven years at a yearly rent of £100, payable monthly, "subject however to the following covenants, conditions, and restrictions in addition to the covenants and agreements implied by the Real Property Act 1861." The express covenants, conditions, and restrictions referred to were as follows:— "Firstly, that the said William Wadham shall pay all rates, taxes, and impositions that may become due in respect of the said land and premises during the said term.—Secondly, that the said William Wadham shall keep up all fences, erections, &c., upon the said land in good and tenantable repair.—Thirdly, that the said William Wadham shall not sub-let the said premises without the consent of the said William Sanders first had and obtained." Under-letting without consent was the particular breach for which ejectment was brought. The portions of the Real Property Act, 1861, on which the question principally turned were ss. 50, part 2, and 124, part 3. S. 50, part 2, provides—

"That in case the rent, or any part thereof, shall be in arrear for the space of six calendar months, or in case default shall be made in the fulfilment of any covenant, whether expressed or implied in such lease on the part of the lessee, and shall be continued for the space of six calendar months, or in case the repairs required by such notice, as aforesaid, shall not have been completed within the time therein specified, it shall be lawful for such lessor to re-enter upon and take possession of such demised premises."

S. 124 enacts that—

"No action of ejectment or other action for the recovery of any land shall lie or be sustained against the registered proprietor under the provisions of this Act, for the estate or interest in respect to which he is so registered, except in any of the following cases:—

* * * * *

"III. The case of a lessor as against a lessee in default."

Boucaut, for the defendant, having obtained a rule *nisi* to enter the verdict for the defendant,

Stow, Q.C., for the plaintiff, showed cause.—Firstly, the portion of the lease referring to under-letting is a condition and not a covenant. Where an estate is held upon condition, a breach of such condition is at common law, and without any express agreement a determination of the term—

Doe Dem Henniker v. *Watt*, 8 B. & C., 308.

The lease was subject to the "following covenants, conditions, and restrictions," and this was a condition—a breach of which gave a right of re-entry. But secondly, a right of entry is given by s. 50 of the Act. It may be contended that ejectment will lie in no instance other than those mentioned in that section, but the Act was never intended to affect any common law forfeitures.

Boucaut, in reply.—The words relative to sub-letting did not amount to a condition, but only to a covenant. If they constituted a condition, then the payment of taxes, and the repairing were also conditions. They were all spoken of generally as "covenants, conditions, and restrictions." Even if it were a condition, ejectment would not lie. The Real Property Act, 1861, s. 124 provides, that no action of ejectment shall lie against a registered proprietor except in the instances thereafter enumerated; and division 3 of that section gives the instance of the case of a "lessor against a lessee in default." The meaning of a lessee in default is defined by s. 50 as being, when his rent is in arrear for six months, and he fails to fulfil a covenant, express or implied, for six months. This case does not come within the definition, for in the nature of things under-letting is not a covenant in respect of which default could be made and continued for six calendar months.

Cur. ad. vult.

19 July—

The judgment of the Court was now delivered as follows by GWYNNE, J.—This was an ejectment brought for breach of an alleged condition in a memorandnm of lease made in pursuance of the Real Property Act of 1861. There are two questions—First, whether the present case comes within the 3rd Division of section 124 of the above-mentioned Act or not; the second, whether the restriction contained in the memorandum of lease against subletting amounts in point of law to a condition, or is a promise or covenant only. The parties undoubtedly stand in the relation of landlord and tenant. There is a memorandum of lease, by which the plaintiff is to occupy part of Town Acre 751, with the house and premises erected thereon, from the 9th day of March, 1868,

for the term of seven years, at the yearly rent of £100, payable monthly, subject, however, to certain express covenants, conditions and restrictions contained in the memorandum of lease itself, in addition to the covenants and agreements which are declared to be, implied in every lease made under the provisions of the "Real Property Act of 1861." The precise language of the memorandum of lease as regards the terms subject to which the defendant was to hold the premises, and which terms are referred to and designated generally and indefinitely as covenants, conditions, and restrictions, is (so far as material to the present case) as follows:—"Firstly, that the said William Wadham (defendant) shall pay all rates, taxes, and impositions that may become due in respect of the said land and premises during the term. Secondly, that the said William Wadham shall keep all fences, erections, &c., upon the said land in good and tenantable repair, except, &c. Thirdly, that the said William Wadham shall not sub-let the said land and premises without the consent in writing of me the said William Sanders (the plaintiff) first had and obtained." It was proved that W. Wadham had sub-let the premises to Mr. Jacobs. It was argued on behalf of the defendant that he being the registered proprietor under the provisions of the Real Property Act of 1861 in respect of a term of years, the right of bringing ejectment was expressly taken away by the effect of the 12th section of that Act, the present case not being within any of the exceptions mentioned in that section. In support of that view it was contended that the terms "lessee in default" used in the third exception meant not a lessee in default generally, but a lessee in default within the intent and meaning of the 50th section only, and against whom that section gave a right of re-entry; and then it was urged that inasmuch as a covenant not to sub-let was not in the nature of things a covenant in respect of which default could not be continued for six calendar months, such covenant was not amongst those indicated by the 2nd division of the 50th section, and for breach of which a right of remedy was thereby given. With this conclusion we are disposed to agree. It was, moreover, contended that the right to bring ejectment in "the case of lessor against lessee in default" was only incidental to a right of entry gained by the 50th section; that unless the one existed the other did not.

But we doubt this position, for suppose in the present case the memorandum of lease had contained an express proviso for insisting on the tenant's sub-letting, would not ejectment have lain? Or to put it another way—Suppose the language of the memorandum of lease to have been thus—"To hold for seven years upon condition that the tenant do not sub-let; and the tenant did sub-let, could not the lessor have maintained ejectment upon the Common Law forfeiture of the term?" According to the view, however, we take of this case, it becomes unnecessary to decide the above questions. We prefer to ground our judgment on the other question—did the language used in the memorandum of lease create an estate upon condition that W. Wadham should not underlet? *Mr. Stow* contended that it did, because of the word conditions used introductory to the terms of the tenantcy. The language used is "subject to the covenants, conditions, and restrictions following;" then came the several stipulations—Firstly, &c., &c. Now it appears to us the word conditions as placed in the memorandum of lease, would equally well apply to the first and second stipulations as to the third, and it appears against reason to conceive that the parties intended each of the stipulations to be a condition. In truth, the second stipulation, taken in connection with the provisions of the 50th and 124th sections, which were implied in the memorandum of lease, is as a condition. And thus is the word of condition used in the introductory part of the sentence satisfied. In Sheppard's Touchstone (Condition, p. 121) it is quaintly said?—"Know, therefore, that for the most part conditions have conditioned words in their frontispiece, and do begin therewith; and that amongst these words there are three words most proper, which in and of their own nature and efficacy, without any addition of other words of reciting in the conclusion of the condition, do make the estate conditional, as proviso *ita quod* and *sub conditione*." Had the word "condition" occurred in the frontispiece of the third stipulation—had that stipulation been worded thus:—Thirdly. And it is hereby *conditioned* that the said William Wadham shall not sub-let—there can be no doubt that a condition would have been created; but placed as the word is, we are of opinion that the stipulation not to underlet is a covenant only, and not a condition. To us it appears that the present case is distinguishable from *Doe Dem*

Henniker v. *Watt*, 8 Barn. & Cres., p. 308, in the circumstance we have pointed out. Then the agreement purported to be in consideration of the rents and conditions therefore mentioned, and the words "it is stipulated" occur several times; and then in the last sentence of the instrument come the words "it is lastly stipulated and conditioned that Watt shall not assign." And it is evident from the language of Bayley, J., in delivering the judgment of the Court, that it was the word conditioned used in the frontispiece of the last stipulation that operated on the mind of the Court.

Rule absolute.

GWYNNE, J., WEARING, J.] [COMMON LAW.

31 MARCH AND 19 JULY, 1870.

RICKETSON v. DEAN AND LAUGHTON.

AGENCY.—Ratification of Authority—Negligence.

R, a cattle owner in New South Wales, delivered cattle to J to take to South Australia, and there to consign to G. D, who had previously acted as the agent for R in South Australia, on receipt of a telegram from J, assuming to act as agent for R, took possession of and sold the cattle and remitted the proceeds to R, less commission.

On action brought by R against D for negligently selling, R stated that he had received the proceeds of sales, but that D had no authority to have sold the cattle on his account, wherefore the Judge nonsuited on the ground that the relation of principal and agent did not exist. On motion for new trial,

Held—*That the receipts of proceeds of sale by R operated as a ratification of the authority of D and made D his agent.*

THIS action was brought to recover damages for a breach of duty by the defendants as agents for the plaintiff in the sale of certain cattle. The pleas were—first, not guilty; secondly, a traverse of the asserted employment of the defendant by the plaintiff; and thirdly, a traverse of the alleged delivery to them of the chattels in respect of which the breach of duty was said to have happened. The cause was tried at the March Civil Sittings before WEARING, J.

The plaintiff's evidence established the following facts. The plaintiff is a cattle-breeder, resident in New South Wales. The defendants are cattle-salesmen, carrying on business in Adelaide. For some time previous to June, 1868, the plaintiff had been accustomed to send beasts for sale to the Adelaide market. In effecting those sales the defendants had been, and shortly before June, 1868, were employed by the plaintiff as his agents. In that month and year he started from his run about 162 head of cattle in custody of William Jones, a drover, consigning them to Messrs. Gordon & Thompson, also cattle salesmen in Adelaide. The mob, however, never reached those gentlemen, but were intercepted and sold at Blanchetown by the defendants, assuming to act in continuance of their previous employment as agents of the plaintiff in consequence of a telegram which was sent to them by Jones while on his route to South Australia, but without the authority of the plaintiff. The action was brought for selling the cattle at Blanchetown at prices lower than they would have realized in Adelaide. On the 14th July, 1868, the defendants remitted the proceeds of the sale of cattle to the Manager of the Australian Mortgage Land and Finance Company, Limited, Melbourne, to the plaintiff's credit. They at the same time sent in duplicate a letter to the Manager and to the plaintiff, explaining the circumstances under which they had taken upon themselves to act as the plaintiff's agents in the sale of his cattle. In this letter account sales were enclosed. At the trial the plaintiff admitted having received the letter, the remittance, and the account sales. On cross-examination, however, he denied ever having authorized the defendants to sell the cattle, or to act in the business as his agents.

On this *Stow, Q.C.*, for the defendants, applied for a nonsuit, contending that the plaintiff's evidence absolutely contradicted the essential averment in his declaration, that "he had employed the defendants for reward to sell and dispose of his cattle."

On the other hand, the plaintiff's counsel relied upon a ratification by him of the defendant's agency, manifested by his bringing this action.

To this *Stow, Q.C.*, replied that, if it were so, the plaintiff must be taken to have ratified the entire transaction, including the very acts, which, by the present proceeding, he was seeking to impeach.

The Judge being of opinion that the last proposition of law was correct, nonsuited the plaintiff, reserving leave to move to set such nonsuit aside, and

Boucaut for the plaintiff, having on a previous day obtained a rule *nisi*,

Stow, Q.C., for the defendant, showed cause.—There was no evidence of any contract, and if the plaintiff had any remedy it would be an action for trespass or trover, or—the cattle having been sold—for their value—

Rodgers v. *Maw*, 15 M. & W. 448
Brewer v. *Sparrow*, 7 B. & C. 310.

Jones did not assume in handing over the cattle to act on behalf of the plaintiff. Whether it was said there was a ratification or not, there was nothing to raise a contract express or implied to the effect stated in the declaration. An act absolutely unlawful could not be ratified, and here the plaintiff said he looked upon the act of the defendant as stealing his cattle.

Ingleby and *Boucaut*, for the plaintiff.—The defendants have been previously employed as agents for the plaintiff. There having been previous dealings, the defendants, in taking the cattle out of the hands of Jones, assumed to act as plaintiff's agents, and there was a ratification by the plaintiff of their agency when he received the money.

Bird v. *Brown*, 4 Exch., 799,

shows the difference between ratifying an act of trespass, and an assumed agency. Dean & Laughton stopped £50 as commission, which they could not have been entitled to unless they acted as agents.

Cur. ad. vult.

19 July—

GWYNNE, J., said it appeared to him that the case was disposed of by the application of the well-known maxim—"*Omnis ratihabitio retrotrahitur et mandato priori æquiparatur.*" The drover Jones having delivered to Dean & Laughton, the plaintiff ratified their previously unauthorized services by receipt of the proceeds. It made no difference whether the action of Messrs. Dean & Laughton was rendered legal by means of request or subsequent recognition. They would equally be the agents in either case, and so liable for negligence if shown. He therefore thought the nonsuit was improper, and must be set aside.

WEARING, J., after stating the facts and the considerations which influenced him in nonsuiting the plaintiff as before detailed, said :— I think I took an incorrect view of the case. I now see that there were two transactions—one being a contract of agency between the plaintiff and the defendants, the other being a contract of sale between him and the purchasers of his cattle. By his conduct I think he confirmed the sales, but did not so ratify the acts of the defendants as his agents as to release them from the consequences of any negligent exercise of their authority, which he might be in a position to prove. The maxim, "*Omnis ratihabitio retrotrahitur et mandato priori æquiparatur*," here applies. By his receipt of the money produced by the sale of his cattle the plaintiff did undoubtedly ratify the sales which the defendant had effected, and this ratification was precisely equivalent to an original authority from him to sell. At the time this action was brought, therefore, the defendants stood in the same position towards the plaintiff as they would have occupied if they had been appointed his agents for the sale of the cattle at the first. Regarding them in the light of agents originally appointed, did the receipt of the proceeds of sale, and of the documents sent therewith, bar the plaintiff from suing the defendants for any negligence in the transaction of which he might have subsequent knowledge? The law relating to this subject I understand to be, that if an agent has, by deviation from his orders, or by any other misconduct or omission of duty, become responsible to his principal for damages, he will be discharged therefrom by the ratification of his acts or omissions by the principal, if

made with a full knowledge of the facts and circumstances; but that if the ratification by the principal be without such knowledge, it will not be obligatory upon him, whether the want of knowledge arise from the designed or the undesigned concealment or misrepresentation by the agent, or from his mere inadvertence. The question here, therefore, is, did the defendants' letter of the 14th July, 1868, impart to the plaintiff complete information of all the facts and circumstances essential to his being able to form a correct opinion as to the defendants' conduct in this transaction? After a careful consideration of the contents of that document, I feel bound to answer the question in the negative. The circumstances as to which I think the information was deficient relate to the prices which ruled in Adelaide at the time of the sale at Blanchetown. The letter was undoubtedly explicit enough as to the origin of the mistake by which the defendants got possession of the plaintiff's cattle; but here it stopped. I am very far from imputing any designed reticence on the part of the defendants. This, however, does not affect the question, because, as I have already observed, mere inadvertent concealment of essential facts by an agent will avoid the effect of a ratification so obtained. If the plaintiff had been informed by the defendants of the rates at which cattle were then selling in Adelaide, he would have been in a position to judge whether it was or was not for his advantage to have his mob sold in Blanchetown; and then I think his silence during the interval which elapsed between his receipt of the letter of the 14th July, 1868, and the 23rd January, 1869, when this action was commenced, might have been regarded as presumptive proof of his having ratified the defendants' acts. But, as I have before remarked, he had not this information. As to the effect of silence on the part of a principal, the following remarks of Mr. Justice Story are directly applicable:—"In respect to silence," says he, "whether it operates as a presumptive proof of ratification may essentially depend upon the particular relations between the parties and the habits of business and the usages of trade. In the ordinary course of business between merchants and their correspondents, it is understood to be the duty of the one party receiving a letter from the other to answer the same within a reasonable time; and if he does not, it is presumed that he admits the propriety of the acts

of his correspondent, and confirms and adopts them. This presumption seems now in favour of commerce to be universally acted upon; and therefore, if the principal, having received information by a letter from his agent of his acts touching the business of his principal, does not within a reasonable time express his dissent to his agent, he is deemed to approve his acts, and his silence amounts to a ratification of them." (Story on Agency, section 258.) On the grounds I have stated, I consider that the nonsuit was wrong, and that, therefore, the rule to set it aside must be made absolute.

Rule absolute; costs of each party at the former trial to be costs in the cause.

HANSON, C.J., GWYNNE, J., WEARING, J.] [COMMON LAW.

9 AND 19 JULY.

STEPHENS v. CORPORATION OF GAWLER.

LANDS CLAUSES CONSOLIDATION ACT, 6 *of* 1847—*Municipal Corporation Act*, 1861—*Injurious affecting of land.*

To entitle a party to compensation under the Lands Clauses Consolidation Act, No. 6 *of* 1847, *for the injurious affecting of land by a Municipal Corporation in the execution of works authorised by Act* 16 *of* 1861, *there must either be an actual acquisition of land or an interference with the right to the soil by the Corporation.*

SPECIAL CASE. The plaintiff was the owner of land in Gawler, and the Corporation of that town, acting in execution of powers given them in the Municipal Corporaion Act of 1861, had altered the footpath by cutting it down several feet below the natural surface, when the plaintiff's cottages were left on a bank, and the use of supports for the walls rendered necessary, which was contended by the plaintiff and admitted by the defendants amount to an "injurious affecting" of the said land. The claim was founded on the Lands Clauses Consolidation Act, 6 of 1847 s. 68, which provides—

"That if any party shall be entitled to any compensation in respect of

any lands, or of any interest therein, which shall have been taken for or injuriously affected by the execution of the works, and for which the promoters of the undertaking shall not have made satisfaction under the provisions of this or the Special Act, or any Act incorporated therewith, and if the compensation claimed in such case shall exceed the sum of Fifty Pounds, such party may have the same settled either by arbitration or by the verdict of a jury, as he shall think fit; and if such party desire to have the same settled by arbitration, it shall be lawful for him to give notice in writing to the promoters of the undertaking of such his desire, stating in such notice the nature of the interest in such lands in respect of which he claims compensation, and the amount of the compensation so claimed therein; and unless the promoters of the undertaking be willing to pay the amount of compensation so claimed, and shall enter into a written agreement for that purpose within twenty-one days after the receipt of any such notice from any party so entitled, the same shall be settled by arbitration in the manner herein provided; or if the party so entitled as aforesaid desire to have such question of compensation settled by jury, it shall be lawful for him to give notice in writing of such his desire to the promoters of the undertaking, stating such particulars as aforesaid; and unless the promoters of the undertaking be willing to pay the amount of compensation so claimed, and enter into a written agreement for that purpose, they shall, within twenty-one days after the receipt of such notice, issue their warrant to the Sheriff to summon a jury for settling the same in the manner herein provided; and in default thereof they shall be liable to pay to the party so entitled as aforesaid the amount of compensation so claimed, and the same may be recovered by him, with costs, by action in any of the Superior Courts."

S. 4 of Act 16 of 1861 (The Municipal Corporation Act) enacts that the "Act specified in the table following (being No. 6 of 1847) "in the *respects* and as to the sections therein set forth shall be "incorporated herewith, that is to say as to the *purchase* of land "otherwise than by agreement—ss. 18 to 68."

The question for the opinion of the Supreme Court was whether the plaintiff was entitled to compensation under 6 of 1847, s. 68.

Stow, Q.C., and *Way* for the plaintiffs.—The question is whether the s. 68 gives a right to compensation, or whether it only prescribes the mode of procedure. If it does not the clause is altogether inoperative, and by placing the interpretation upon it that it does is the only means of giving effect to the words of the Act; and if it were possible to give such an effect to an Act of Parliament as to enable a man to obtain compensation whose property has been

injured by a Corporation or Company, the Court should so interpret it. That view is supported by the case of

Ferrar v. *London Commissioners of Sewers*, L.R., 4 Ex., 227, 19, L.T.N.S., 485, 21 L.T.N.S., 295

in which it was decided in the first instance expressly that the 68th clause did have that effect, and was overruled on appeal upon another point, the Judges in the Exchequer Chamber expressing their belief that such a construction could be placed upon the clause if it were necessary to decide it.

Boucaut and *Barlow* for defendants.—The 68th clause gave no right whatever, but only prescribed the mode of procedure for the enforcement of a right. The argument that the Legislature would not intend that a Corporation should take land without compensating the owner would have been equally open in any of the cases in which it had been held that the 68th clause had not the effect contended for, and it was not necessary to decide that the 68th clause was inoperative, because it was clearly the intention of the Legislature that lands taken should be compensated for; but it did not follow that because the Legislature would not intend to take away a man's land without paying him for it, that in regard to the inconvenience a man suffered by having a street lowered for the public good the same principle should apply. The Corporation under the 106th section of their Act were compelled to make the streets as nearly as practicable of the same breadth and level. If they were held liable to compensate the plaintiff, the whole value of the rates, which was limited to two shillings in the pound, might be swallowed up in paying claims for compensation. There were many instances in the Act in which the Corporation were especially empowered to do what would cause loss or damage to individuals, and

Boulton v. *Crowther*, 2 B. & C., 703,

shows that it was intended that private individuals might be made to suffer injury for the public good. A person could not obtain compensation for lands injuriously affected, unless "some land"

had been taken by the Corporation. S. 68 was only incorporated with the Municipal Corporation Act in respect to the purchase of land otherwise than by agreement. Here there was no purchase or acquisition of land, but only an injurious affecting by the manner in which the Corporation had used its own property. Supposing therefore that section to have the effect contended for by the plaintiff—that it gave a right and not merely prescribed a mode of procedure—still it was clear that there being no land acquired it would not apply to this case.

Cur. ad. vult.

19 July—

Judgment was delivered by HANSON, C.J.—This is an action founded on the 68th clause of the Lands Clauses Consolidation Act, to recover compensation from the defendants for injury occasioned to land of the plaintiff's by reason of the levelling of the footway in front of such land. It is conceded that the lands of the plaintiff have been, in fact, injuriously affected by the action of the defendants, and the only question is whether he is entitled to recover compensation for such injury. The question depends upon the construction that we are to give to the 68th section of the Lands Clauses Consolidation Act, incorporated with the Municipal Corporation Act of 1861, the provisions of which last named Act have, so far as this point is concerned, been extended to the Corporation of Gawler. On the part of the plaintiff it has been contended that the language of that clause not only provides a procedure for the purpose of ascertaining and recovering compensation for the injurious affecting of land by any public work when a right to compensation is expressly given by the Act authorising the work, but also that it operates to give a right to compensation for any injurious affecting in cases where the Act is silent on the subject. And in support of this position they rely upon the case of *Ferrar* v. *Commissioners of Sewers*, as decided in the Court of Exchequer. On referring to the provision of the Municipal Corporations Act, there appear to be two classes of works which the Corporation has power to execute—one the making of new streets, &c., involving the acquisition of land, to which the provisions of the Lands Clauses Consolidation Act appear to be applicable;

the other that of levelling streets, &c., to be performed upon public property, or in certain cases upon the property of individuals, but without any interference with the right to the soil, and to which, consequently, these provisions seem to be inapplicable—and the works which occasioned the injury of which plaintiff complains of are of the latter class. Even, therefore, if we concurred in the judgment of the Court of Exchequer in the case of *Ferrar* v. *Commissioners of Sewers*, and that the provisions of the Lands Clauses Consolidation Act were incorporated with the present Act, so far as regards the injurious affecting of lands as well as its acquisition, upon which point it is not necessary to express an opinion, it seems to us clear that they do not apply in the present case. We therefore answer the second question in the negative, and there will be judgment for the defendant.

HANSON, C.J., GWYNNE, J., WEARING, J.] [COMMON LAW.

19 JULY, 1870.

POTOSI MINING COMPANY (LIMITED) v. O'HALLORAN.

COMPANY.—Calls—Shares—Forfeiture.

The articles of association of a company provided that if calls were not paid within a certain time after notice the shares in respect of which such call was made should be absolutely forforfeited.

Held—*That the shares were not* ipso facto *forfeited, but the forfeiture was at the discretion of the Directors.*

THIS was a case sent up from the Adelaide Local Court for the opinion of the Supreme Court, whether the defendant was liable as a contributor to the liquidator's call in respect of 140 shares in the Company, which he alleged to have been forfeited. The question was whether by reason of the defendant's refusal to pay a call of two shillings per share made by the Directors, payable in two instalments on the 4th January, 1870, and the 4th February, 1870, the shares became absolutely forfeited twenty-one days from the date of default. The articles of association of the Company pro-

vided that if any shareholder should not pay calls within twenty-one days after notice requiring him so to do, that the shares would become absolutely forfeited.

GWYNNE, J., observed that it had been held, over and over again, that forfeiture was at the discretion of the Directors, and they might avail themselves of the power or not.

Bundey, for the defendant, relied upon the notice given, in terms of the 46th clause of the deed of settlement, of the call, and that if the call was not paid at or before the time specified in the said notice the said shares should be absolutely forfeited to the Company without further notice. He quoted

Woollaston's Case, 4 De Gex and J., 437
Knight's Case, L. R., 2, C.A. 321,

to show that in the cases where it had been held, as Mr. Justice Gwynne said, there was a discretionary power left with the Directors, and it was not defined, as in the present case, by the deed, that on non-payment the shares would be absolutely forfeited.

Per Curiam.—The non-payment of calls did not work a forfeiture, and there being nothing to show that the Directors had declared them forfeited, the defendant was rightly placed on the list of contributories

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HANSON, C.J., GWYNNE, J., WEARING, J.] [EQUITY.

2 AUGUST, 1870.

ROSCROW V. HARRIS

WILL.—Construction.

A testator by will devised his real and personal estate upon trust to permit his wife to receive £150 a year, and if the trustees thought that insufficient to sell such real and personal estate, and to pay such further sum as they thought fit. On her death one-third of his real and personal estate to be subject to her appointment, and

the other two-thirds of which he should be possessed at the "time of his death" to go to his brothers.

The income being less than £150 *a year, on bill filed by the wife, praying for declaration that she was entitled to be paid* £150 *a year and such further sum as the trustees thought proper out of the estate,*

Held—*That the testator having intended his wife should have* £150 *a year at least, and there being no expressed intention that it should be paid out of the rents and profits only, that the* corpus *was available.*

THIS was a bill filed to obtain a declaration of the true construction of the will of the late William Roscrow, of Clare. The plaintiff was his widow, and the defendants, William Harris and Herbert Dean, trustees, to whom with the widow the testator had devised and bequeathed his real and personal estate upon trust "to permit his wife during her widowhood to receive the annual income of £150, and if in the judgment of the trustees the said annual income of £150 was insufficient, to convert into money any part of his personal estate, and absolutely to sell and dispose of so much and such part of his real estate as they, he, or she might think fit, and out of the moneys to arise therefrom to pay at discretion to the testator's wife so much as in their discretion would be sufficient for her maintenance." In a later portion of the will he directed that in the event of his wife dying without having married again, one-third of his estate should go to such persons as she appointed, and the other two-thirds of his real estate to the children of his brothers and sisters. The income of the estate it appeared was less than £150 per annum, and the defendants were of opinion that the sum of £150 was not sufficient for the plaintiff's maintenance, but refused to pay her such sum as would be sufficient, on the ground that they were not authorized to diminish for any purpose whatever the *corpus* of the real or personal estate. The plaintiff prayed that it might be declared that she was entitled to be paid the sum of £150 per annum, and such further sum as in the judgment of the trustees should be sufficient for her maintenance.

Stow, Q.C., and *Wigley* for plaintiff.—The Court will carry out what was the obvious intention of the testator to make ample pro-

vision for his wife, and would not construe words of reference which occurred in another part of the will to override that intention, even although the *corpus* of the estate might have to be resorted to—

Phillips v. *Guttridge*, 11 W.R., 12
Prowett v. *Prowett*, 12 W.R., 119
Foster v. *Smith*, 2 Y. and C., C. C., 193
Bullock v. *Thomas*, 9 Sim., 634
Wroughton v. *Colquhoun*, 1 De G. and Sm., 36
Birch v. *Sherratt*, 2 L. R., C. A., 645.

Barlow for defendants.—There was no apparent intention on the part of the testator that his widow should receive £150 if the annual income fell short of that amount, and the latter part of the will devised absolutely the two-thirds of the property of which he died possessed to other relatives, and that could not be divested—

Hawkins on Wills, 71.

The latter clause being distinct in its operation must prevail, and to hold the contrary would be to render it possible for the whole *corpus* to be frittered away, and the wife for whom the testator showed such anxious care might be left unprovided for. The power to pay an additional sum to £150 did not enable the trustees to pay such additional sum if the estate did not produce £150 per annum—

Sherratt v. *Bentley*, 2 Myl. & K., 149
Birch v. *Sherratt*, 2 L. R., C. A., 644.

Per Curiam.—The real intention of the testator, evidenced in the general terms of the will, was that his wife should have at least £150 a year; and as there was no expression that he intended it to be paid out of the rents and profits only, the *corpus* was available.

Declaration as prayed.

HANSON, C.J., GWYNNE, J., WEARING, J.] [COMMON LAW.

22 AND 28 JULY, 1870.

CHARNOCK v. COLE (EXECUTOR.)

PLEADING.—Admission—Executor.

In an action against an Executor, the admission made by not pleading ne unques *executor is only of some species of executorship, and the defendant may show that he was executor* de son tort *only.*

Semble—*That an action will not lie here against an executor appointed by another jurisdiction.*

THE action was brought against Stephen Cole, one of the two executors of Dougald Fletcher, on a bill of exchange accepted by the testator. Plea—*Plene administravit.* The bill was admitted, and proof was given that the testator resided in South Australia at the time of his death. An affidavit made by the defendant was put in and relied on by the plaintiff as proof of assets, which stated that sheep and sheep-runs had been sold for £26,000 in New South Wales. It was also proved that probate of the will of the deceased had been granted in New South Wales to the defendant and another person as executors, and the plaintiff relied on the admission in the record—there being no plea of *ne unques* executor—as proving the executorship here.

The defendant's contention was, that the admission was merely of some species of executorship, *e.g.* executor *de son tort*, and he proposed to show he was not executor in South Australia.

HANSON, C.J., before whom the cause was heard, ruled that the admission of executorship was conclusive; that there was proof of assets, and directed a verdict for the plaintiff.

Subsquently *Way*, for the defendant, having obtained a rule *nisi* to set aside the verdict,

Stow, Q.C., and *Fenn*, for the plaintiff, now showed cause.—Evidence of stock having been sold under the authority of the defendant, though there was no evidence of the money having

come to his hands, was proof of assets. It must be taken that the will extended to all property in South Australia or New South Wales; and, so far as regarded the distribution of personal estate, the law of domicil prevailed, and probates in other countries were merely auxiliary to the probate which was granted in the country of the domicil; a person to whom administration was granted in the country of the domicil was entitled to dispose of and distribute not only the property he acquired by virtue of that grant, but also all the surplus in the foreign countries; and the law of New South Wales must be taken to be the same, in the absence of evidence to the contrary, as the law of South Australia. (HANSON, C.J.—We should take official notice that New South Wales is an English colony, and would take the English law.) Yes; and if altered, evidence must be given—

Story, 840, *et seq.*
Reeves v. *Ward*, 2 Bing., N.C., 239
Holden v. *Ballantyne*, 8 W.R., 390
Scarth v. *Bishop of London*, 1 Hag. Ec., 625
White v. *Rose*, 3 Ad. & E., 498.

The decisions of the English Courts rested upon the doctrine of allegiance, and a person who died domiciled in a colony is subject to the laws of that colony to the extent and in the same sense as a British subject was subject to the laws of England if he died domiciled in a dependency of the empire, he and his property were subject to the laws of the empire; and the same principle which induced English Courts to hold that the goods of a British subject in another country were assets so far as proceedings in their Courts were concerned should be adopted here. Where a person a subject of this colony died domiciled here, his assets, wherever situated, were to be considered assets for which his executor was chargeable in any proceedings before the Courts of the colony—

Dowdale's case, 3 Co., 348
Attorney-General v. *Dimond*, 1 C. & J., 370
Attorney-General v. *Cockerell*, 1 Price, 170
Hancocke v. *Prowd*, 1 Saunders, 333
Currie v. *Bircham*, 1 D. & R., 35.

Where there are two executors, one might be sued—

Shipbrook v. *Hinchbrook*, 11 Vesey, jun., 254
Aplyn v. *Brewer*, 2 Williams on Executors, 166
Crosse v. *Smith*, 7 East., 246
Underwood v. *Stexens*, 1 Mer., 712.

Andrews, Q.C., and *Way*, in support of the rule.—The admission on the record, that the defendant is executor, is simply that he is some kind of executor, whether lawful or *de son tort*. (HANSON, C.J.—Have you any case for that proposition.) The case of

Yardley v. *Arnold*, C. & M., 434

expressly decided that; also

Edwards v. *Grace*, 2 M. & W., 190.

Then the evidence showed that he was not lawful executor in South Australia.

Per Curiam.—On that ground there will be a new trial.

Rule absolute.

HANSON, C.J., GWYNNE, J., WEARING, J.] [EQUITY.

2 AUGUST.

HURST v. HURST.

PRACTICE.—Orders in Chambers.

Judges here have power to hear such equity matters in Chambers as are habitually heard in Chambers in England. The Equity Act, s. 71, does not take away from the Court the power of appointing a Special Examiner.

THIS was a summons for the appointment of an examiner in England, taken out on behalf of the plaintiffs, for the examination of one of themselves in England. The matter had been referred by Mr. Justice WEARING to the Court in conse-

quence of doubts as to the propriety of his disposing of it in Chambers. The question turned upon the interpretation of the 104th clause of the Equity Act, which provides for the dispatch of such part of the Equity business in Chambers as can, without detriment to the public, be heard in Chambers, and the Rule No. 10, Chapter 32, specifying among Chambers business "Relating to the conduct of suits or motions."

Barlow for the plaintiff.—The appointment of an Examiner is a matter which might properly be heard before a Judge in Chambers—

Daniels, C. P., 846
Rawlins v. *Wickham*, 4 Jur., V. C. R., N. S., 990
Read v. *Prest*, Kay, App. 14
Section 21, 15th and 16th Victoria, c. 8.

Ingleby, for defendant, opposed the application, on the ground that if the Judge had not power to hear it he had not power to adjourn it, and the Court had no power to appoint a Special Examiner, that power being taken away by the provisions of the Equity Act (clause 71), and the only power substituted being that of examination by interrogatories—

McNiel v. *Acton*, 22 L. J. Ch. N.S., 584
Crofts v. *Middleton*, 9 Hare, App. 18
Edwards v. *Spaight*, 2 J. and H., 617.

Per Curiam.—The Judges in Chambers would have power to hear such matters as were habitually decided in Chambers in England, and per GWYNNE, J., when they do there is no appeal to the Full Court. The power of the Court to appoint a Special Examiner has not been taken away by the Equity Act of 1866-7.

5 AUGUST, 1870.

ENGLISH, SCOTTISH, AND AUSTRALIAN CHARTERED BANK v. DUBOIS.

JUDGMENT. — Certiorari — *Writs of execution — Supersedeas — Amendment.*

A Judgment of a Local Court, removed by certiorari *into the Supreme Court does not thereby become a judgment of the Supreme Court, but only has the effect of such judgment for purposes of execution. Writs of execution thereupon should therefore show the judgment in the Local Court and the removal and the omission so to do is not amendable under the Common Law Procedure Act,* 1853, *being a matter of substance and not form.*

IN this case the plaintiff had received judgment in the Local Court, and had removed it into the Supreme Court by *certiorari*. A writ of *ca. sa.* issued thereon, and the defendant was arrested while on his way to give evidence at an arbitration—was released on *habeas*—was again arrested on a writ of *ca. sa.*, which recited the judgment as of the Supreme Court. The 9th section of Act 12 of 1865-6 provides, that upon the return of such writ, the party desirous of suing out execution shall cause to be entered up a judgment as of the Supreme Court in the form contained in Schedule B, and such judgment shall be signed and have the same effect as an ordinary judgment of the Supreme Court, and all proceedings may be had thereupon accordingly."

A rule *nisi* having been granted for a *supersedeas* on the grounds that the writ should have been an *alias*, and should have recited the judgment of the Local Court and the removal into the Supreme Court,

Stow, Q.C., now showed cause.—First, a *supersedeas* is not the proper proceeding to set aside a writ of *ca. sa.* Section 7 of Act 12 of 1865-6 and Schedule B justify the form of the writ on which the defendant was arrested. The 9th clause of the Act 1865-6 says that the judgment should be entered up " as of the Supreme Court " and should " have the same effect as an ordinary judgment of the Supreme Court, and all proceedings may be had thereupon

accordingly." Those words dispense with the necessity of reference to the judgment as a judgment of the Local Court in any ulterior proceedings after it is entered in the Supreme Court. If the Court should entertain any contrary opinion, the writ should be amended under the 174th section of Act 5 of 1853—

Shaw v. *Maxwell*, 6 T.R., 450
Mackie v. *Smith*, 4 Taun, 321
Parker v. *Bayley*, 17 L.J., Q.B., 45

Moulden, in support of the rule.—The writ of *ca. sa.* treats the judgment as a judgment of the Supreme Court. That is against the very words of the Act, which provides that the judgment removed shall merely have "the same effect" as such judgments. Before the Act of 1865-6 there would have been no question about the form of writs of execution in such cases—

Chitty's Forms, 779
Dunn v. *Harding*, 2 Dowl., P.C., 803
Phillips v. *Price*, 1 D. & L., 110
Towers v. *Newton*, 1 Q.B., 319

and the new Act made no difference in the effect of a judgment removed.

Per Curiam.—The writ was bad in not reciting the real judgment upon which it was founded, and as it was a matter of substance the amendment could not be allowed.

HANSON, C.J., GWYNNE, J., WEARING, J.] [COMMON LAW.

14, 15 JULY, 1 SEPTEMBER.

BROWN V. MCLOUGHLIN.

FENCING ACT, 1865-6.—*Pastoral Lessees.*

The Fencing Act, 6 *of* 1865-6, *does not apply to fences erected by lessees of the Crown for pastoral purposes.*

THIS was an action to recover one-half the value of a dividing fence between the land of the plaintiff and defendant, erected by the

plaintiff, and of which the defendant had availed himself. The cause was tried in April before WEARING, J., at the Robe Circuit Court, when a verdict was found for the plaintiff, leave being reserved to the defendant to move to set aside the verdict and enter a nonsuit. The plaintiff and defendant were both lessees of the Crown for pastoral purposes, and the fence in question had been erected between the Mount Scab run, occupied by the plaintiff, and the Avenue Range, then occupied by the defendant. It appeared that a pastoral lease was granted to the plaintiff in 1859, which determined by his taking a renewal under Act 10 of 1864 in the year 1865. The fence in question was erected in 1863. Pursuant to Act 10 of 1864, the valuator appointed by the Government, it was proved, had valued the run, improvements, &c., of the defendant; and the defendant stated that he had been told by the plaintiff in conversation with reference to the run, that the valuator had allowed him £4,000 for "fencing, improvements, and all." The valuator, however, was not called, and this was the only evidence of any allowance having been made to the plaintiff by the Government for his fences. It was contended for the defendant that this statement was evidence to go to the jury of the fence being a party fence, of the plaintiff having been allowed by the joint landlord of the parties in respect of this fence, and that the degree of contribution was under Act 6 of 1865-6 immaterial. The Judge considered specific evidence of the allowance should have been given, and the admission was too vague to constitute any evidence to go to the jury of the fence being a party fence. There was no dispute as to the fence being a dividing fence, nor as to its erection by the plaintiff; but the grounds of nonsuit taken at the trial were :—1. That the Crown was not bound by an Act, unless expressly named; and that here the Crown, through its tenant, was sought to be affected. 2. That the Fencing Act did not apply to pastoral lessees of the Crown. 3. That the plaintiff was not the owner of the fence. 4. That it was waste for a pastoral lessee to erect a fence on the demised land. The argument turned on the Fencing Acts of 1846 and 1865-6. Act 10 of 1846 recites in its preamble that persons are discouraged from incurring the expense of fencing on their lands by reason of there being no means by which persons settling upon adjoining fenced land, &c.

can be made to contribute a due proportion, &c., and then enacts—

"That if any person shall heretofore have erected, or shall hereafter erect a sufficient fence dividing his land from the land adjoining thereto, and the occupier of the adjoining land shall after the passing of this Ordinance, in enclosing the same, avail himself of the dividing fence so erected, or any part thereof, he shall be liable to pay the owner of the adjoining land by whom the dividing fence was erected, or to the then owner thereof, the half of the then value of so much of the dividing fence as shall be made available as a fence to such adjoining land; and if the person so liable to pay such half value shall not, on demand thereof by the person to whom it shall be payable, forthwith pay the same, the same shall be recoverable in due course of law as for so much money laid out and expended by the plaintiff for the use of the defendant, or otherwise as the case may be."

S. 4 defines the meaning of the term "owner" as follows—

"That under the term 'owner' shall be included tenants in fee simple, tenants in tail, tenants for life, or tenants for any term of years not being less than seven years; and that the term 'Sufficient Fence,' as used in this Ordinance, shall be construed to mean any fence capable of resisting the trespass of great cattle."

At the time of the passing of this Act there were no pastoral leases, the sheefarmers merely holding licences from year to year. In the year 1850, however, authority was given to the Governor to "demise" or "license" for pastoral purposes for a term of fourteen years, which leases or licences were to contain provisions for resumption, for the benefit of the natives, for mining purposes, for crossing sheep, &c. By Act 6 of 1865-6, the previous Fencing Act (10 of 1846) was repealed and other provisions made in lieu thereof. S. 4 of 6 of 1865-6 provides—

"When any occupier of land has heretofore availed himself, or shall hereafter avail himself, of any fence, not being a party fence, dividing such land from the land adjoining, the occupier in possession shall, upon demand, be liable to pay to the owner of such dividing fencee one-half part of the value at the time of such demand of so much of such fence as shall abut upon the land so occupied as aforesaid."

A "party fence" is defined as—

"Any fence which has been jointly erected by the owners or occupiers o adjoining lands to divide such lands, or towards the erection of which such owners or occupiers have contributed, or towards the cost of erecting which either owner or occupier has contributed under the provisions of this Act or of the Ordinance hereby repealed."

And the word "owner" is defined—

"Owner of a dividing fence" shall mean the person who, irrespective of this Act, by act of parties, is liable to keep such fence in repair; and if none, then the person who would be primarily damnified, if such fence were destroyed."

J. Downer, for the defendant, having obtained a rule to show cause why a nonsuit should not be entered on the grounds taken at the trial—

Stow, Q.C., and *Way*, for the plaintiff, showed cause.—It is admitted that the plaintiff erected the fence, and that the defendant has not contributed. It therefore is not a party fence within the words of the definition clause. Then, the defendant being an occupier of land, who has availed himself of a dividing fence which is not a party-fence, all the requisites of s. 4 of the Act of 1865-6 are fulfilled, and the plaintiff is entitled to recover one-half the value of such fence. It is admitted that the plaintiff is a tenant of the Crown, and that the occupier of the adjoining run (the defendant) has not contributed in any way, unless the evidence offered by the defendant of an admission by the plaintiff that he had received £4,000 for improvements from the Government was evidence of contribution within the meaning of the Act. The original lease of the plaintiff commenced in 1861 and had been renewed, the new lease being granted under an Act, No. 10 of 1864, which empowered the Valuator of Runs to make allowance for improvements by a reduction in the rent, and that allowance it was contended would be a contribution by the Crown as owners of the adjoining land for the fence which had been erected. Now it was optional with the Valuator, and not incumbent upon him, to allow for improvements; and if he did, that would not be a contribution within the meaning of the Act by the Government as owners of the adjoining lands, but a contribution as landlords and owners of the land in respect of which it was made. If the Valuator thought fit to make the allowance it was never intended, and could not make any difference in the position of the parties. (GWYNNE, J.—What do you conceive to be the position of an occupier of adjoining lands in respect to the fence when he has made his contribution? Would he then become joint tenant?) The

Act says so. It is then a party fence. (GWYNNE, J.—Then the duty of the Valuator would be to give each credit for half.) Yes; but if he had power to give it all, the person who put it up was the one who would be primarily damnified by its destruction. He took the renewed lease at an increased value by reason of the improvement, and he was the person bound to keep it in repair. Then it was said the Crown were not bound under the Act; but it was not a question in which the Crown were in any way interested. It was quite clear that pastoral lands were not waste lands of the Crown. (HANSON, C.J.—That point was decided in a case in reference to the Yelta Mine.) It was in consequence of that that the provision was inserted in the Mineral Leases Validating Act, No. 11 of 1868-9, to allow mineral leases to be granted out of pastoral lands. The question here was whether the lessee had an estate in the land independent of the Crown, and he clearly had. As to the point that fencing was waste, it was only necessary to point out that by various Acts fencing was recognized as a right of the lessee, and he was bound by the lease to keep the fencing in repair, both as regards fences now and hereafter to be erected. Therefore, as to its being waste, it was not necessary to press any argument upon the Court. It was obviously the policy, not merely of the present Fencing Act, but of all the Acts with respect to the waste lands of the Crown, to encourage fencing. In certain cases the tenant who erected fences was entitled to compensation, and when they had been erected, the Legislature required the lease to contain a covenant to keep them in repair. The Act 10 of 1864 actually provided "for the pastoral lessees receiving compensation for fences erected by them," a singular provision for the landlord to reward the tenant for having committed waste. It would also be a positive disadvantage to the public if it was held that the Fencing Act did not apply except to lands which had been alienated in fee-simple, because there were many instances of agricultural holdings in the middle of runs occupied by pastoral lessees. (HANSON, C.J. —How can we in the absence of any evidence as to the valuation assume that the Valuator made an allowance for this fence?)

Ingleby, *Boucaut*, and *J. Downer*, in support of the rule.—Firstly, was the fence in question a party fence; and secondly,

if not a party fence, was the defendant bound to pay for such a fence. With regard to the first question, the defendant became a tenant of the Crown in 1861. In 1863 he completed the fence in question, and the lease under which the improvement was made expired in 1865, and a renewed lease was granted to the plaintiff. At the expiration of the first lease the fence became the property of the Government, and another person settling down on adjoining land could in no way be liable in respect of the fence, at all events to any but the Crown. (GWYNNE, J.—You say that if he takes a new lease, he takes it with the appurtenance and begins afresh?) Exactly; and in reference to the absence of evidence of the valuation, the presumption would be that the Government had paid. If the second lease, which expired six months after the action was brought, had been put an end to by the Government, the tenant would have been entitled to compensation; but this one having expired by effluxion of time, the fence vested in the Government. This was a dividing fence, which belonged to the Government, and they had let it to both parties. As to the evidence of the fence having been paid for, the Valuator was the judge of improvements, but the word "may," where a public duty was cast upon an officer, meant the same as "shall." He must perform the duty of going and looking at improvements, and there was actual evidence that the £4,000 allowed was for wells, huts, and fencing. The next point was that the erection of the fence was an infringement of the rights of the public, and therefore the defendant would not be made to place himself in the position of *particeps criminis* by being made to contribute. (GWYNNE, J.—Of course, if the putting up of the fence is prohibited by Statute, he would not be able to get compensation.) (WEARING, J.—You say putting up fences on runs is an illegal act?) Yes. The lease reserved to the aboriginal inhabitants full and free ingress and egress into and upon the land, with the right to erect wurleys, and use for food birds and animals *ferœ naturæ* saving all roads and paths for Her Majesty's subjects, and other privileges which would be impossible if the runs were fenced. It could not be intended that the Fencing Act was to apply to large tracts of country, which were open to the use of the aborigines, at any time, or to any person travelling to any waterhole, or taking out a timber licence. It would

be unjust to compel the defendant to pay for eleven miles of fencing, when a person taking his sheep to a waterhole would have a right to knock it down. Then, by Act No. 8, of 1863 "any person wishing to cross a lessee's land with sheep or cattle shall give notice of the time and the point where he wished to enter the run and the point where he wished to leave it, and shall drive them through in a direct course." How was he to go in a straight line if fences obstructed the way? Was he to knock them down? That showed that the Legislature never contemplated the fencing of Crown lands, and did not intend that the Fencing Act should apply to them. If it did, the whole of the country from Port Augusta to the Northern Territory was liable to its operation, and a poor man who used his rich squatter neighbour's fence to make a pen to shelter a few sheep from the breeze would be liable for half the cost of his fence. (HANSON, C.J.—No. It is made voluntary on his part whether he avails himself of the fence if erected; that is, if he erects or uses any other fence which abuts on such first mentioned fence, or make such fence in any way a portion of the means whereby such land is in any way enclosed.) The old Act was inoperative, because a man by leaving a panel, so that he did not completely enclose his land, avoided the liability, and this was framed to meet that. There was a vast difference in the position of a farmer, who held a section in fee, and a squatter, whose tenure was practically a thread—who might have his land taken away from him on six months' notice, or proclaimed into a hundred at once. The policy of the Legislature, as shown by the Waste Lands Act of last session, was to encourage agricultural occupation, but not pastoral; and there must be something to show that they intended the provisions of the Fencing Act to apply to the latter class, and to make a man pay for a fence who only held his run just so long as the Government chose. The fence in respect of which the plaintiff claimed was really a party fence, having at the expiration of the plaintiff's first lease reverted to and become the property of the Crown, and as it was inconsistent with the context, the Court were not bound by the definitions given in the interpretation clause of the Act of 1865-6, because those definitions were expressly made to apply only where not inconsistent with the subject matter. If the Court were absolutely bound

by the definition of those words, then the anomaly would arise, that where the Crown demises runs with a dividing fence between them, to different persons, each party being by the terms of his lease "liable to keep such fence in repair," would be entitled to recover half the value of the fence from his neighbour, and it would be only a question of who sued first; and further, that where the owner of land similarly fenced, demised the land on one side of the fence, the lessee covenanting to keep the fence in repair, the lessee being under the definition-clause the "owner," could recover from his landlord one-half the value of the landlord's own fence. The Court was not bound in the construction of an Act by the actual words, as instanced in the case with regard to the Statute of Marlbridge. (HANSON, C.J.—You say that one tenant would have to pay another tenant for the erection of a fence which belonged to the Crown?) That would be the effect of such a construction as the Court were asked to put upon the Act—that either party might sue the other when neither of them had really contributed anything. The definition of a party fence, as a fence which had been "jointly erected by the owners or occupiers of adjoining lands," or towards the erection of which "such owners or occupiers had contributed," was clearly inconsistent with the subject-matter; and therefore the Court could, under the power given in the third clause, put its own construction upon the meaning of the term. In the next place, it was never intended that the Fencing Act should apply to runs. The original Act, to which the Court might look to construe the existing Act, specified that it was to enable persons "settling" on adjoining lands to be made to contribute towards the erection of fences. That could not refer to persons using land for pastoral purposes, because a reference to the Statute 5th and 6th Victoria, cap. 36, sec. 17, showed that they were merely licencees in the same way as licencees to cut timber, and licencees from year to year only. Therefore, the definition of "owners" in the Act of 1846 being persons seised in fee or for a term of years not less than seven, would of course not apply to the pastoral tenants, and subsequent legislation has not altered the nature of the interest, but only extended the term of the licence. The regulations published in the *Gazette* of November 7, 1850, refer to "demises or licences," using the terms as synonomous and

showing that it was the same right, only extended to fourteen years. The regulations from time to time in force before and after the first Act was passed were substantially the same—gave the same rights and imposed the same restrictions. The pastoral lessees had no more control over the land than the old licencees. The Acts were in *pari materie*, and the preamble of the first was incorporated in the second, the object of both being to encourage persons "settling" on land. It was really nothing more than a licence to the squatter for the sheep to eat the grass. He was nothing more than a licencee, whose licence was revocable by a certain Act at a moment's, but under any circumstances at six months' notice. Could a person be said to be settling who went upon land which could be retaken? (HANSON, C.J.—There is no doubt they were not included in the first Act, but it may be that the passing of the new Act was with the purpose of making the alteration.) The provisions in the lease were inconsistent with the supposition that fences were contemplated. Sheep were to be travelled across in a direct line. So that a squatter putting up a fence would, to prevent breaches of his covenants, have to keep some one ready at any moment to remove every post and rail. (WEARING, J.—You say they have to travel sheep in a straight line. Might not they be obstructed by a flock of the lessee's sheep, and are they to box them?) That is the very reason why notice is to be given. (GWYNNE, J.—Of course there must be some deviation. They could not travel in a straight line.) There is no doubt the object was to prevent them travelling in the devious course in which they used to do for the sake of picking up food on the way. Of course, a reasonable construction must be placed upon the term "direct." (GWYNNE, J.—There might be a steep hillside, for instance.) The Legislature have precluded the possibility of misconception by stating that the person travelling the sheep shall fix the termini at which he intends to enter and leave the run, and fencing in a run would be utterly inconsistent with that. (GWYNNE, J.—Large flocks of sheep could not, in the nature of things, be driven through one slip-panel without injury.) If restricted in that way it would scarcely be free ingress. (WEARING, J.—As a matter of fact, I have seen flocks travel through these gates. There is what they call a race which gathers them together, and

they travel through in large numbers in that way.) But still that is an obstruction. It was impossible that it could have been contemplated parties should be subjected to such disabilities as that, if they were to have free ingress and egress. (GWYNNE, J.—The Fencing Act was a remedial Act; and, of course, it would be the duty of the Court to advance the remedy, and suppress the mischief; but one knows that at that time the fencing of runs was not part of that mischief, because the runs were not fenced. The evil did not exist; so consequently the remedy is not applicable. I agree with that.)

Stow, Q.C.—With reference to the crossing of runs, the Scab Act was a restraining Statute. It did not profess to give a right, but rather assumed that a right existed in certain cases of travelling along certain roads or tracks, and that power having been abused, this provision was inserted to compel them to go in a direct course to their destination, but it did not interfere with the lessee's right to fence. Then, with regard to the Fencing Act, such a construction as was contended for would, if upheld, defeat the very object of passing the new Statutes. A licence to occupy land for a certain time was a lease, and the fact of the regulations providing for demises and leases did not show that they were synonymous, but the contrary. The tenant had the right to occupy the land, subject to the right of certain persons to pass over it under certain circumstances, and of the Government to resume it upon notice. With regard to the argument that the fence had reverted to the Crown, the Court would see that the second lease was granted by virtue of the right of renewal, so that from the time the fence was erected the Government never had any interest in it.

Cur. ad. vult.

1 September—

Judgment was now delivered as follows, by HANSON, C.J.—This was an action under the Fencing Act to recover from the defendant half the value of a fence alleged to be the property of the plaintiff, of which the defendant had availed himself. The question turns entirely upon the construction to be put upon the Fencing Act (No. 6 of 1865-6), whether that can be held to be

applicable to fences erected by lessees of the Crown for pastoral purposes. It was conceded upon the argument, in fact there could be no doubt, that the original Fencing Act would not apply to those lands held by lessees of the Crown for pastoral purposes, and the second Act is obviously *in pari materie*, it appears to me, and intended to produce the same benefits and to cure the same evils which were intended to be accomplished, prevented, or cured by the original Act. And looking to the peculiar position of lessees of the Crown, the uncertainty of their tenure, the right possessed by the Crown to resume lands for hundreds and other purposes, and the rights reserved to the natives and to the public, which undoubtedly to a certain extent interfere with the use and value of fences, we are of opinion that the second Act also must be held to apply only to land that has been purchased from the Crown, and not to land held by lessees of the Crown for pastoral purposes. We think, therefore, in this case the rule must be made absolute.

Rule absolute for nonsuit.

HANSON, C.J., GWYNNE, J., WEARING, J.] [COMMON LAW.

3 AUGUST AND 1 SEPTEMBER.

LINDSAY v. WALKER AND LORD.

THE COMPANIES ACT, 1864.—*Bill of Exchange—Company—Directors—Stamp.*

L, a creditor of a Company of limited liability, constituted under the provisions of the Companies Act, 1864, *addressed his Bill of Exchange "To the Directors of the G. B. B. D. and M. C. Co., Limited." These letters were the initials of the name of the Company. This Bill was accepted "for the G. B. B. D. and M. C. Company, Limited—Walker and Lord, Directors; J. Ker, Manager." And against the initial letters in the direction the full name of the company was legibly impressed by an embossed stamp. On action against W. and L., seeking to make them personally liable as acceptors, and for having accepted the bill, without men-*

tioning in it the name of the Company as required by the 39th Section of the Companies Act, 1864.

Held—1. *That the name of the Company was mentioned in the bill.*

2. *That the acceptance was by the Company, and not by the defendants.*

The declaration contained two counts. The first count charged, that the defendants, being Directors of the Guichen Bay Boiling Down and Meat Curing Company, Limited, the plaintiff by his bill of exchange directed to the said Company by the name of "To the Directors of the G. B. B. D. & M. C. Company, Limited," required the said Company to pay, &c., and that the defendants as such Directors accepted the said Bill without mentioning therein the name of the Company, and that the bill had not been paid by the Company. The second count charged the defendants as acceptors of a bill of exchange. Pleas—That the name of the Company was mentioned, and denial of the acceptance. The first count of the declaration was founded on s. 40 of the Companies Act, 1864, which provides—

"If any limited company under this Act does not paint or affix, and keep painted or affixed, its name in manner directed by this Act, it shall be liable to a penalty not exceeding Five Pounds, for not so painting or affixing its name, and for every day during which such name is not so kept painted or affixed; and every director and manager of the company who knowingly and wilfully authorizes and permits such default, shall be liable to the like penalty; and if any director, manager, or officer of such company, or any person on its behalf, uses or authorizes the use of any seal, purporting to be a seal of the company, whereon its name is not so engraven as aforesaid, or issues or authorizes the issue of any notice or advertisement, or other official publication of such company, or signs or authorizes to be signed on behalf of such company, any bill of exchange, promissory note or endorsement, cheque, order for money or goods, or issues or authorizes to be issued any bill of parcels, invoice, receipt, or letter of credit of the company wherein its name is not mentioned in manner aforesaid, he shall be liable to a penalty of Fifty Pounds, and shall be further personally liable to the holder of any such bill of exchange, promissory note, cheque, or order for money or good for the amount thereof, unless the same is duly paid by the company."

The case was tried at the March Civil Sittings, when a verdict was entered by consent for the plaintiff, leave being reserved for the defendants to move for a nonsuit or to vary verdict, and the Court on such motion to be in the position of a jury and to find the facts. The bill put in at the trial was directed to the "Directors of the G. B.

B. D. and M. C. Company, Limited," and was accepted in this form—

"Accepted for the G. B. B. D. and M. C. Company, Limited,

"W. Walker, } Directors.
"G. Lord, }

J. G. I. Ker, Manager."

Against the initial letters in the direction, the Directors, before accepting the bill, impressed the name of the Company in legible characters by means of an embossed circular stamp. The other clauses of the Act material to the argument and decision were the 39th, which provides—

"Every limited company under this Act, whether limited by shares or by guarantee, shall paint or affix, and shall keep painted and affixed, its name on the outside of every office or place in which the business of the company is carried on, in a conspicuous position, in letters easily legible, and shall have its name engraven in legible characters on its seal, and shall have its name mentioned in legible characters in all notices, advertisements, and other official publications of such company, and in all bills of exchange, promissory notes, endorsements, cheques, and orders for money or goods purporting to be signed by or on behalf of such company, and in all bills of parcels, invoices, receipts, and letters of credit of the company."

And the 46th clause, which enacts—

"A promissory note or bill of exchange shall be deemed to have been made, accepted, or endorsed on behalf of any company under this Act, if made, accepted, or endorsed in the name of the company by any person acting under the authority of the company, or if made, accepted, or endorsed by or on behalf or on account of the company by any person acting under the authority of the company."

A rule to show cause why the verdict should not be entered for the defendants having been granted,

Stow, Q.C., and *Ingleby* showed cause.—The bill was drawn upon the defendants themselves, and accepted by them, which would entitle the plaintiff to judgment on the second count; but if it should be held to be a bill drawn upon the Company, then, being accepted in the name of the Company by two Directors, and failing to comply with the requisites of the Companies Act in not having the full name of the Company inserted in it, the plaintiff would be entitled to a verdict on the first count. A bill of exchange must

be accepted by the person or persons to whom it is addressed. The bill was directed to the Directors of the Company, and, according to the latest decisions upon the subject, they and not the Company are the acceptors—

Bult v. *Morrell*, 12 A. & E., 745
Nichols v. *Dimont*, 9 Exch., 154
Mayer v. *Charles*, 5 E. & B., 978
Thomas v. *Bishop*, 2 Strange, 955

The cases cited in moving for the rule—

Halford v. *Cameron*, Coalbrook Railway Company, 16 Q. B., 442
Aggs v. *Nicholson*, 1 H. & N., 165
Lindus v. *Melrose*, 2 H. & N., 293, 3 H. & N., 177
Stephens v. *Reynolds*, 5 H. & N., 513

were actions on promissory notes, and the questions arising here were not involved. If it is not a bill drawn upon the defendants personally, but upon the Company, the Directors, assuming to accept it on behalf of the Company, have not complied with the requisites of the Statute, and are therefore personally liable. The 39th clause of the Act No. 13 of 1864 requires that the Company "shall have its name mentioned in legible characters in all bills of exchange, promissory notes, endorsements," &c. The embossed stamp forms no part of the bill of exchange; and therefore the bill has not the name of the Company on it—

Serrel v. *Salford Railway Company*, 19 L.J., N.S., C.P., 371
Lindus v. *Bradwell*, C.B., 590

The Company was an incorporated Company, and as such could only act by means of its name and by virtue of the powers given to it by the Act. The bill in this case was not accepted in accordance with s. 46 in the name of the Company, or by any person on behalf of the Company. It was addressed to the Directors of

the Company, and according to the authority of *Mayer* v. *Charles* and *Bult* v. *Morrell* the Directors became personally liable—

Price v. *Taylor*, H. & N., 540, and
Alexander v. *Sizon*, 20 L.T., N.S., 38

The 39th and 40th clauses show that a Company shall not be liable upon a document which is addressed to Directors and not to the Company. (HANSON, C.J.—The 46th clause seems to me to be conclusive, that, supposing the Company to be named, if it is accepted on behalf of the Company by a person acting on behalf of the Company, it shall be deemed to have been accepted by the Company.) Then that brings us into conflict with the rules of law that a bill of exchange to be valid must be accepted by the person to whom it is addressed. (GWYNNE, J.—That, it seems to me, was the intention of the 46th clause, to do away with the little quibbling about by whom the bills were drawn and by whom accepted. Suppose it was originally only addressed to Ker, and accepted by the defendants, it appears to me that would be an acceptance which the Company would be liable for.) That appears to conflict with the law of merchants. It might be declared upon as a promissory note. (GWYNNE, J.—I only suggested that this Companies Act, which is a copy of an English Act, seems to me to provide that if a bill of exchange is produced in a Court of Law, accepted by a person having authority under the Company to accept it, that shall be considered as the acceptance of the Company.) But the name must be mentioned. The initials do not constitute the name of the Company, and the stamp cannot be said to be a mentioning of the name in legible characters.

THE COURT called on the defendants to reply to the first count only.

Way and *J. Downer* in reply.—The name does appear. The bill is directed by the plaintiff to the Company by its initial letters. The name of the Company is impressed on the initial letters in the drawing of the bill, as if to explain what was meant by those letters. The Statute requires the name to be legible, and here all agree that the stamp was quite legible when the bill was given.

The Court will look at the stamp on a bill as assisting the question, whether it is of a Company or not—

1 Linley on Partnership, 285.

And this shows the stamp to be a portion of the instrument. The plaintiff argues that a bill of exchange should not be under seal, but that argument proves the object of putting the stamp on here. The stamp was used not as a seal, but as a means of mentioning the name of the Company. Not being on as a seal, what other object could it have been placed there for? But the word required by s. 40 to be mentioned in particular is "limited," the object being to give people notice that they are dealing with a Company of limited liability. That is laid down in—

Penrose v. *Martyn*, 6 E. & B., 499, 28 L.J., Q.B., 29,

and here this word "limited," the material word, was written in full in the body of the bill. Secondly, the plaintiff is estopped from saying the name is not mentioned. The declaration says that the plaintiff directed this bill to the Company by its initial letters The argument on the other side is, that a bill must be accepted as it is drawn. Accordingly the defendants accepted this bill in the very manner in which it was directed, and are then sought to be made personally liable by the plaintiff, who originated the wrong—who is at least the *particeps criminis*. This comes within the legal maxim *allegans contraria non est audiendis*. But, thirdly, the name is mentioned, independently of the seal. Mentioned means expressed, and the plaintiff cannot say that the very formula that he uses to mention the name of the Company to others does not mention the name to him. See Judgment of Lord Campbell in *Penrose* v. *Martyn*.

Cur. ad. vult.

1 September—

HANSON, C.J., delivered jndgment:—This is a rule to set aside the verdict found for the plaintiff, and to enter a nonsuit or a verdict for the defendants. The declaration contains two counts—one founded upon the Companies Act, No. 13 of 1864, alleging

that the plaintiff drew a bill of exchange upon the Guichen Bay Boiling Down and Meat Curing Company, Limited, by the name of the Directors of the G. B. B. D. & M. C. Co., Limited, and that the defendants, as Directors of the Company, accepted such bill, and that the name of the Company was not mentioned in legible characters in the said bill of exchange, by reason whereof the defendants became personally liable to pay the said bill; and the second count being against the defendants as acceptors of a bill of exchange drawn upon them by the plaintiff. Upon the trial the learned Judge directed a verdict to be entered generally for the plaintiff, reserving leave to the defendants to move to set it aside, and to enter a nonsuit, the Court to have power to draw such inferences from the facts given in evidence at the trial as a jury might draw. The facts of the case were that the defendants were two of the Directors of the Guichen Bay Boiling Down and Meat Curing Cnmpany, Limited; that the plaintiff drew a bill addressed "to the Directors of the G. B. B. D. & M. C. Co., Limited," and the defendants accepted such bill "for the G. B. B. D. & M. C. Co., Limited;" but on the face of the bill there appeared a stamp not in ink, but in raised letters, with the full name of the Company, and it was impressed over the address of the bill. This stamp had become partly obliterated, though still legible upon a careful inspection; but the evidence of the plaintiff showed that it was quite legible when the bill was accepted. Upon this state of facts the plaintiff contended first that the bill being drawn upon the Directors of the Company, and not upon the Company, must be taken to be drawn upon them in their individual character; and then the fact of their having accepted it for the Company would not prevent them from being personally liable; and in support of their position the cases of *Bult* v. *Morrell* and *Mayer* v. *Charles* were cited. It appears to me, however, that when a bill is drawn upon the Directors of a limited Company, the natural and even the necessary inference is, that it was drawn upon them in their representative and not in their personal character, with the intention of making the funds of the Company, and not the property of the Directors, the source from which it would be paid; and as we are authorized to draw such inference as a jury might draw, I should certainly draw this inference in the present

case. Independently, therefore, of the inference to be drawn from the 46th section of the Companies Act, which provides that a bill accepted on behalf of a Company by a person authorized in that behalf shall be deemed to be accepted by the Company, I should have no doubt that the verdict upon the second count should be entered for the defendants. With regard to the first count, the question was entirely one of fact for the jury. Was the name of the Company mentioned in legible characters in the bill of exchange in question? Had I been on the jury, I should have had no hesitation in finding that it was; and as we are here in the position of a jury, I am of opinion that upon this count also the defendants are entitled to have the verdict entered for them.

Rule absolute to enter verdict for defendants.

GWYNNE, J., WEARING, J.] [COMMON LAW.

30 MARCH AND 19 JULY, 1870.

GOODFELLOW v. GREIG.

LANDLORD AND TENANT.—Distress—Beasts of Plough—Wheat.

The rule that a landlord must distrain all other distrainable goods before seizing beasts of plough does not apply to heaps of wheat mixed with chaff, lying on the ground as thrown from the reaper, and semble *does not apply to any goods distrainable by Statute only.*

The declaration, which was for wrongful distress, charged that the defendant seized "beasts of the plough," when he might have satisfied his claim by other goods. The case had been tried before GWYNNE, J., at the Civil Sittings, June, 1869, when a verdict was found for the plaintiff. The evidence showed that there was a sum of £90 due for rent to the defendant, who had distrained the plaintiff's beast of the plough. There were no other distrainable goods on the demised premises, except a heap of wheat mixed with chaff lying on the ground as thrown from the reaper. This the defendant had not distrained, and the question mainly was,

whether the wheat should have been seized before resorting to beasts of the plough.

Ingleby, for the defendant, having obtained a rule to show cause why a new trial should not be had,

Stow, *Q.C.*, and *Palmer*, for plaintiff, showed cause.—As to the argument for the defendant that the defendant was not bound to take into account wheat which was in a heap collected by reaping machine, the Statute 2 W. & M., Ses. 2, cap. 5, s. 3, made sheaves and heaps of corn immediately available, because it said not only that the landlord might sell them, but he was bound to sell within five days. Growing crops were different. The principle established by the cases was that at Common Law the landlord must take everything that was available before beasts of the plough—

Simpson v. *Hartopp*, 1 Smith's Leading Cases, 385
Piggott v. *Bertles*, 1 M. & W., 441.

Ingleby, in support of the rule.—The heap of wheat was not distrainable at Common Law, which was shown by the case quoted of *Simpson* v. *Hartopp*. It was only distrainable by Statute, and the landlord was not bound to resort to that if he could get things more easily convertible. There were other goods on the premises immediately distrainable, and therefore he seized them.

Cur. ad. vult.

19 July—

The judgment of the Court was delivered by GWYNNE, J.—This was an action under the Statute of Marlbridge for taking beasts of the plough, it being alleged that there were sufficient other distrainable goods on the premises. The question raised turned upon a certain heap of wheat which was lying on the premises. If that had been taken by the distrainer, then it would appear by the verdict of the jury that there was sufficient distress upon the premises without resorting to the working bullocks; but if he was not bound to take the wheat he was right in seizing the cattle. A similar case was decided in *Piggott* v. *Bertles*, reported in 1 M. & W.

The question there raised was whether a person was justified in seizing beasts of the plough when there was sufficient distress in the shape of growing crops, and the Court held that he was not bound to resort to growing crops first, but was justified in seizing the beasts of the plough. The principle alleged was that growing crops were not seizable under Common Law, but only under the Statute, and the Statute did not give the same facile mode of dealing with them as the Common Law remedy against ordinary chattels. The question we have to consider is whether that principle was applicable to the heap of wheat in question mixed with the hulm and chaff as it came from the reaper. That clearly was not distrainable at Common Law, but only under the Statute; and we are of opinion that the principle of *Piggott* v. *Bertles* would be applicable. In the last edition of Smith's Leading Cases that case was referred to, and the author said:—"Possibly the principle of this case may be thought hereafter to refer to other cases under the Statute;" and it appears to us the principle should be extended particularly in a colony such as this. If a man seized a quantity of wheat, he could not alter its nature, nor could he coerce purchasers; and yet it must be sold at the end of five days. It would appear to be for the advantage of both landlord and tenant that the principle of the case cited should be extended to all subjects which were only liable to seizure under Statute. We consider the defendant was not bound to seize the wheat, and therefore there must be a new trial.

Rule absolute.

HANSON, C.J., GWYNNE, J., WEARING, J.] [COMMON LAW.

29 AUGUST AND 1 SEPTEMBER, 1870.

COOPER v. STRAPP AND COLEMAN.

CURATOR OF INTESTATE ESTATES.—Administration Bond —Assignment—Act No. 6 of 1860.

The Curator of Intestate Estates has power under the Act 6 of 1860, making choses in action assignable, to assign a bond given to him in

his public capacity by sureties for due administration of the estate of an intestate, and the assignee is entitled to sue thereon.

This action was brought on a bond for £4,000, given by the defendants to the Curator of Intestate Estates as sureties for the due administration of the estate of Robert Quilty, deceased, by his widow and executrix. On breach of the conditions, the Curator of Intestate Estates assigned the bond to the plaintiff, who now declared thereon.

Demurrer to declaration, on the ground that the bond was not assignable.

Barlow and *Wigley*, for the defendants.—The plaintiff sues as trustee and as assignee of the bond. A bond is not assignable at Common Law. It may be assigned under the Testamentary Causes Act, No. 11 of 1867, but this bond was dated two years anterior to the passing of that Act. The declaration shows that the plaintiff intended to sue under the Testamentary Causes Act and no other. But in order to validate an assignment under that Act, it is necessary to obtain an order of a Judge, and the declaration does not show that such an order was obtained. The plaintiff must show that he had, by taking the necessary steps, the title which the Act gave—

Young v. *Hughes*, 4 H. & N., 76
Sandrey v. *Mitchell*, 3 B. & S., 405

Foster, in support of the declaration.—The action is based on the 19th clause of Act No. 6 of 1860, which provides that "every person shall have power to assign any chose in action, and the assignee thereof for the time being may bring every such action thereupon in his own name," &c. The bond was executed in pursuance of the old practice under Act 31 of 1855-6, sec. 1., which was since repealed, except so far as might be necessary to support the validity of any proceedings. The bond being a right of action, was under this assignable, and there is nothing in the Act to show an intention to exclude rights vested in public officers.

Barlow, in reply.—Under Act No. 31 of 1855-6, an adminis-

tration bond could not be assigned. This Act applied solely to persons who were acting in their own right. This bond was given to the Curator of Intestate Estates, and could not be assigned under Act No. 6 of 1860. It is not possible to imagine that a person holding a chose in action in an official capacity can transfer that by assignment to any person in the community without authority, either from the Court or his superiors in office. To place the construction upon the declaration that the allegation of the trusteeship of the plaintiff is surplusage, is to affirm that the plaintiff, as soon as he recovered the money on the bond, would be entitled "to hold it for his own use," because that was the right given under Act 6 of 1860.

Cur. ad. vult.

1 September—

HANSON, C.J., said:—This was an action brought by the plaintiff, as assignee of a bond, against the defendants, who are sureties to this bond. The bond was given by the defendants to the Curator of Intestate Estates, and by him alleged to have been assigned to the plaintiff. To this declaration a demurrer has been filed, on the ground that it did not appear by the declaration that the bond was assignable. That was the substantial point; and in support of that it was alleged that it was quite clear it did not come under the Testamentary Causes Act, and that was the only authority under which a bond given for the purposes of administration could be put in suit. On the part of the plaintiff, it was argued that the provisions of Morphett's Act—No. 6 of 1860—applied; but then it was answered on the part of the defendants that that which was a general provision of an Act could not be intended to apply to a bond given under special circumstances to a public officer, and especially could not be held so to apply as to give him power to assign a bond which he had received in his official character to a private individual. We took time to consider the last point, and upon consideration it appears to us that the language of Morphett's Act is quite large enough to include, and in fact necessarily includes, cases of this sort; therefore, so far as the language of the Act is concerned, there is no doubt the assignment is valid, and the plaintiff may sue upon the boud in his own

name. With regard to the public inconvenience which may occur from the Curator of Intestate Estates being able to assign a bond in such a way, the Curator by whom this was assigned is an officer of this Court—and the Court has abundant power to restrain him in the exercise of the power which he possesses. We therefore don't think that any ground of inconvenience exists, which would induce us to put a narrower construction upon the language of the Act under which this bond purports to be assigned than that which the words of the Act themselves import. The judgment will therefore be for the plaintiff.

Demurrer overruled.

HANSON, C.J., GWYNNE, J., WEARING, J.] [COMMON LAW.

6 SEPTEMBER, 1870.

RE DAWSON, DECEASED.

INTESTATE DISTRIBUTION ACT, 1867.—*Personal Representative—Real Estate.*

Administration of the personal estate of a deceased person can be granted in the same way since the Intestate Real Estates Distribution Act, 1867, *as before*

Per GWYNNE, J.—*Administration can be granted of the personal estate only, Act* 29 *of* 1867, *making the real estate vest in the personal representative as an incident to such character, and not by grant from the Court.*

Ingleby moved that administration be granted. A short time ago he mentioned the case, and suggested that letters of administration should be granted in the common form. Since that he was informed that the Chief Justice, in the matter of the late Dr. Webb, of Clare, had granted administration of the real as well as the personal estate. Such being the case, he thought it right to mention the matter, in order that the practice might be settled.

At present he understood there was a difference between what took place in one Judge's chamber and another.

HANSON, C.J.—What is your application?

Ingleby.—To take administration in the common form.

HANSON, C.J.—Well, you can take it in common form.

Ingleby.—My difficulty is that it is sworn as to realty as well.

HANSON, C.J.—Well, there is no harm in that.

GWYNNE, J.—You see we exercise this peculiar jurisdiction under a local Act, the Testamentary Causes Act. It is given by reference to the English Act, that is to say, over personal estate, and personal estate only. There is a Statute, no doubt, in force here, which says that the real estate shall rest in the personal representative—that is, by virtue of the character it is incident to his office; but I apprehend the grant would be under the Testamentary Causes Act—than is, a grant of the personalty—as if that other Act had never been passed. It appears clear to me that the grant must be in the usual form irrespective of that.

Ingleby.—That is what I have always asked for.

HANSON, C.J.—The only question before us is whether when a person has sworn to real and personal estate he is entitled to administration of the personal estate. Of that, I apprehend, there can be no doubt.

Granted.

GWYNNE, J.] [CIVIL SITTINGS.

13 SEPTEMBER, 1870.

CULLEN AND ANOTHER v. TIDEMANN.

BILL AGENT.—Principal—Action.

A Bill of Exchange endorsed in blank and handed to an agent on behalf of his principal does not entitle such agent to sue thereon in his own name without the authority of his principal.

Action on a Bill of Exchange by endorsees against drawer. Plea (*inter alia*) denying endorsement. The evidence showed that the plaintiffs were the attorneys in South Australia for Mrs. Clisby, under a power authorising them amongst other things to collect all moneys, &c., and for her and in her name to bring any action, &c. The bill, the subject of the action, was endorsed by the defendant in blank and delivered to the plaintiffs as such attorneys. The plaintiffs relied on the power of attorney as authorising them to bring this action.

J. Downer, for defendant.—The plaintiff must be nonsuited. The power of attorney authorised the plaintiffs to sue in Mrs. Clisby's name, and not in their own. Independently of the power, the plaintiffs could not sue. The bill was never endorsed to them, but to Mrs. Clisby; and without a subsequent endorsement or authority from her, the plaintiffs could have no title—

Roscoe Nisi Prius, 186
Machell v. *Kinnear*, 1 Stark, 499.

Barlow, for plaintiffs.—The endorsement *prima facie* gave title to the plaintiffs. When a bill is endorsed in blank, as many as agree upon it.

GWYNNE, J.—The plaintiffs have no title to the bill and must be called.

Nonsuit.

GWYNNE, J., WEARING, J.] [COMMON LAW.

16 SEPTEMBER.

IN RE HOUSTON.

MINOR OFFENCES ACT, 1869-70.—*Assault.*

The punishment for common assault not being limited to two years' imprisonment, two Justices have no jurisdiction over the offence under the Minor Offences Procedure Act, 1869-70.

The prisoner was brought up on *habeas corpus*. Two Justices at Truro had convicted him under the Minor Offences Act for having at Truro, wilfully, violently, and maliciously assaulted Rebecca Houston, his wife, by striking her on the head and about the body with his fists, and by biting her on the hand with his teeth, and adjudged that he should be imprisoned in the Common Gaol at Adelaide, and there kept to hard labour for the space of one calendar month.

Ingleby, for the prisoner.—By the Minor Offences Procedure Act, No. 8 of 1869-70, sec. 3, two Justices can, with the consent of the prisoner charged, try certain classes of offenders, and amongst others—"All misdemeanours not being by law punishable by imprisonment, with or without hard labour, exceeding two years; and all other offences punishable by one or more Justices of the Peace;" and by section 4, "the Justices may convict and punish as by law punishable; nevertheless, where the punishment is by imprisonment, by imprisonment not exceeding six calendar months with or without hard labour, with solitary and separate confinement not exceeding one calendar month; and where the punishment is by fine, by fine not exceeding £20, and by imprisonment for six months if the bail is not sooner found." Under the Police Act, No. 15 of 1869-70, sec. 53, a Justice might convict, and on conviction might inflict a penalty of not more than five pounds. By Common Law a common assault was a misdemeanour, and for which the Supreme Court might fine or imprison, but there was no limit either as to the amount of fine or duration of imprisonment. If the Justices adjudicated under the Police Act, they had no power to punish otherwise than by fine. But if the Justices

assumed to proceed under the Common Law, then as by law the offence was punishable by imprisonment without limit as to time, they had no jurisdiction, because they had only jurisdiction in such misdemeanours as were by law punishable by imprisonment not exceeding two years. Nor could the conviction be supported by No. 9 of 1859, sec. 11, by which for an assault with intent to do grievous bodily harm the punishment provided was three years. Should, however, the Court think the Justices had jurisdiction for a common law assault, then there was no power to inflict hard labour, because this Court could not order hard labour.

Andrews, Q.C., Crown Solicitor, in support of the conviction.—As to the second ground, by the 4th clause of the Minor Offences Procedure Act, Justices had power to inflict hard labour. As to the question of the power of Justices to convict for a common law assault, the period of punishment did not in fact exceed two years, although it was laid down in the text-books that a misdemeanour is punishable by fine, or imprisonment, or by both.

GWYNNE, J.—The prisoner was convicted of a very cowardly assault upon his wife, beating her very severely and biting her hand, and was sent to Gaol for a month. If the facts were true, one would not regret if he had been sent there for twelve months instead of one. However, he is brought up on *habeas corpus*, and it is said two Justices had no power under the Minor Offences Act, No. 8 of 1869-70, to adjudicate upon a simple assault. It is also said that, even if they had jurisdiction, they had no power to imprison with hard labour. If they had jurisdiction to deal with the assault, I have no doubt they had power to commit with hard labour under the fourth clause. But there is a portion of the third section which says the Justices shall have jurisdiction in all cases of "misdemeanours not being by law punishable by imprisonment, with or without hard labour, exceeding two years." If the offence was punishable by imprisonment for a period exceeding two years, they had no jurisdiction, because the Act confines their jurisdiction to misdemeanours, the punishment for which is within two years. Now, according to the law of England when I left, and up to a recent period, common assault was by Common Law

punishable by fine or imprisonment, or by both, or by requiring persons to find sureties for their keeping the peace. But the power to imprison was unlimited, and very severe punishments, extending to several years, have been inflicted under it. That was the law of England, and continued so up to the passing of the 24th and 25th Vic., Cap. 100, which confined the punishment for simple assault to two years. No such Act has ever been adopted here. The Minor Offences Act is copied from the English Act, but there is this distinction, that the punishment remains as it was under the Common Law, whereas in England by the Act 24 and 25 Victoria it is brought within two years. So that in England under the very words of this Act they can punish for simple assault; but that is by virtue of the Act introduced there, but not here, and we having the Common Law, which enables the Court to imprison for an unlimited time, it appears to me that in South Australia a common assault is not a misdemeanour whose punishment is not confined to a period within two years, and consequently this conviction was wrong, and the prisoner must be discharged.

GWYNNE, J., WEARING, J.] [COMMON LAW.

11 OCTOBER, 1870.

WATTS v. GIESECKE AND OTHERS.

LOCAL COURTS ACT, 1861—*Rules—Interpleader—Appeal—Prohibition.*

Where an Inferior Court makes an order without jurisdiction no appeal lies therefrom, prohibition being the proper remedy

Interpleader summonses under the Local Courts Act, 1861, *must be issued out of the Court wherein the action is pending—Rule* 58 *which provides a different course being* ultra vires.

In this case Mark Watts, as plaintiff, obtained a judgment against Messrs. W. & C. Giesecke in the Kapunda Local Court, upon which execution issued. A warrant was sent to the Local Court at Port Wallaroo. The bailiff levied, paid the moneys into the Wallaroo

Court, and caused an interpleader summons to be issued out of that Court to try a claim made to the proceeds by Watts. On the trial of this summons a verdict was given for the claimant. S. 144 of the Local Courts Acts regulates the issuing and trial of interpleader summons, but Rule 58 made under that Act provides that the summons shall be issued from the Court nearest to which the levy was made. It was under this rule that the proceedings had been taken.

Palmer, for defendant, having obtained a rule *nisi* for a new trial on the ground *(inter alia)* of wrongful determination of the Court that it had jurisdiction,

Lake, for claimant, showed cause.—If the plaintiff's contention that the Wallaroo Court had no jurisdiction is correct, the proceedings before it would be a nullity, and the proper course for the party complaining would be to apply for a prohibition. The 144th clause of the Local Courts Act, however, taken in connection with the 58th rule, providing that an interpleader summons should be issued in the Local Court nearest to the place where the levy was made, gave the Wallaroo Court jurisdiction. (GWYNNE, J.—Can a rule abrogate the express provision of an Act of Parliament?) No, it cannot; but the construction of the 144th section is that there are two Courts in which the action might have been brought. (WEARING, J.—It is the Court in which the action has been brought. There is only one Court in which the action has been brought—that is at Kapunda.) If the Act said the summons should be issued out of the Court where the action was brought I should not be contending against your Honor's construction. (GWYNNE, J.—So it does in effect. It says—"That where any third person shall have any claim to or in respect of any goods or chattels taken in execution under the process of any Local Court," &c., it shall be lawful for the "Clerk of *the* Court" to issue a summons." What does that mean?) It applies to the Court whose officer was "charged with the execution of such process." (GWYNNE, J.—We are of opinion that "Clerk of the Court" refers to the Court where the action was brought.) Then the rule must be discharged, because the application should have

been for a prohibition. From a Court which has no jurisdiction there can be no appeal.

Buggin v, *Bennett*, 4 Bur., 2037
Bacon's Abridgment, 584

Palmer, in reply.—Under the Local Courts Act either party, if he was dissatisfied with the determination of the Court on a point of law, could appeal. It would be seen by the proceedings that there was a discussion upon the point of law which was reserved by the Magistrate, and that would justify the execution creditor in appealing. The question was whether or not the Court was bound by the 58th rule, and whether such was not *ultra vires*. The argument as to prohibition would not apply, and if it did the Wallaroo Local Court would have the money which had been paid into its hands, and be deprived of the power of disposing it.

GWYNNE, J.—We are of opinion, upon a consideration of the 144th clause, that the Court had no jurisdiction whatever to decide upon the summons. However, they decided it, and they proceeded to judgment. *Mr. Palmer* comes here and says he is dissatisfied with that determination, and he says he is dissatisfied with it on a point of law, and he says that point of law is that the 58th rule gives them no jurisdiction. On the other side, it is said that a prohibition was the proper proceeding here, and not appeal. We think that if the Inferior Court had no jurisdiction that we have none, and the rule must therefore be discharged, but under the circumstances without costs.

Rule Discharged.

HANSON, C.J., GWYNNE, J., WEARING, J.] [COMMON LAW.

1 NOVEMBER, 1870.

GREEN v. PARR AND ANOTHER.

GUARANTEE.—Payment—Demand.

A guaranteed to a Bank the repayment by B of a certain sum "when called upon." Subsequently he received notice from the bank that B had drawn the sum guaranteed, and that from thenceforth he would be charged with all interest thereon. The Bank never specifically called upon A to pay the sum guaranteed. A paid it, however, and on action to recover the same from B,

Held.—*That A was entitled to pay and sue for the amount guaranteed whenever he thought proper, without waiting till called upon.*

This action was tried before Mr. Justice GWYNNE at the Civil Sittings on the 13th September. It was brought to recover money paid by the plaintiff under a continuing guarantee to the South Australian Banking Company for £2,000. The terms of the document were that the plaintiff "guaranteed repayment, when called upon, of an advance not exceeding £2,000. On the trial it was proved that the Bank had never called upon the plaintiff to pay the sum guaranteed. The Manager, on the contrary, said he had endeavoured to dissuade the plaintiff from doing so, and it appeared that a dispute between the parties was the cause of the plaintiff wishing to terminate his guarantee. The Bank had, however, before payment by the plaintiff, given him notice that defendant had drawn the amount guaranteed, and they would in future hold him liable for interest thereon. The evidence showed the payment was made to the Bank of South Australia, the guarantee being to the South Australian Banking Company. It was stated however by a clerk of the Bank that they were identical, but this evidence was objected to. On the trial a verdict was taken for the plaintiff by consent, the questions of law being reserved for the Full Court.

Way, for the defendant, now moved for a rule *nisi* to set aside the verdict, on the grounds that the plaintiff was not entitled to pay till called upon, and that the payment was not made to the Bank mentioned in the guarantee; the evidence of the clerk to

the Bank as to the identity being he submitted not receivable. He cited—

Birks v. *Trippet*, 1 Saund., 321
Antrobus v. *Davidson*, 3 *Meriv.*, 569
Addison on Contracts, 573.

HANSON, C.J.—We think that there is no ground for granting a rule. The surety was under a legal liability to pay, which might be converted into an obligation at any moment at the will of a third person. We think that he was not bound—there are many circumstances under which it might be most injurious to him—to allow the liability to continue, simply because the person who had a right to change it into an immediate obligation chooses not to exercise that. We think the plaintiff was not bound to wait until called upon. The liability for the debt on his part was complete, and it could only be discharged by payment by himself or the principal. Therefore we think he was entitled to pay whenever he pleased, and paying in that way his right of acquiring the money from the principal would immediately arise, because he did not in any way accelerate the liability of the principal. And with regard to the other point it is not suggested that in reality if a new trial were had, evidence could be given to show that the body which received the money was not the body to whom the guarantee was given, so we think the rule should not go upon that point.

GWYNNE, J.—I am of the same opinion upon the same grounds, which are identical with my opinion expressed at the trial.

WEARING, J., concurred.

Rule refused.

HANSON, C.J., GWYNNE, J., WEARING, J.] [COMMON LAW.

8 NOVEMBER, 1870.

DYKE v. ELLIOT.

EJECTMENT.—Equitable Pleading.

Semble—*That an equitable plea cannot be pleaded in an action of ejectment.*

THE action was in ejectment, and on a previous day a rule *nisi* had been granted to set aside an order of Mr. Justice WEARING allowing an equitable plea, on the grounds—Firstly, that the defendant could not plead an equitable defence until the Supreme Court should have rules to regulate the proceedings in reference to it, and that no such rules had been made; and secondly, that in no case could a plea, whether equitable or otherwise, be pleaded in ejectment.

Strangways, for the defendant now showed cause.—The absence of rules could not override the express provisions of an Act of Parliament. The 176th clause of Act No. 5 of 1853 provided as to equitable defence that it shall be lawful for any defendant by leave of the Court or any Judge to avail himself of any defence in Equity, and the pleadings would be precisely similar to an ordinary action. (GWYNNE, J.—What would you plead to?) There is no declaration, certainly. (GWYNNE, J.—Then there can be no plea.) Under English Supreme Court Procedure Statute of 1852, which is the Act upon which our Act of 1853 is based, it was, upon the argument now being used by your Honor, decided that this section did not apply to actions of ejectment, because there were no pleadings. (GWYNNE, J.—The construction put upon it by the English Judges was that you might plead an equitable plea where pleas were pleadable at all; but, inasmuch as there are no pleas in ejectment, it could not be applied.) If clause 176 of Act No. 5 of 1853 had stood by itself, the Court would adopt the same construction; but Act No. 24 of 1855-6 declares that the provision contained in the Supreme Court Procedure Amendment Act shall apply, and shall be taken to apply to actions of ejectment as well as

other actions. Therefore, the analogy does not exist, and the Court would construe an Act so as to further the direct intention of the Legislature rather than adopt a construction which would have the effect of depriving a defendant of the right which, with the consent of the Court or a Judge, the Legislature had said he should have. In ejectment, where pleadings are abolished, it is more necessary, if justice is to be done, that the defendant should have the right of setting up an equitable defence than in an ordinary action. (HANSON, C.J.—This Act of 1855-6 does not alter the question, which is to be tried in ejectment. That is settled by Act No. 5 of 1853, and the question is whether the claimant was entitled to possession.) (GWYNNE, J.—That is possession at law.) (HANSON, C.J.—Yes. That is the question that will have to be tried. Assuming the state of facts, as stated in your plea, that Morgan was seized in fee, and the defendant has a good title under him, then your not having any legal title, the Judge would have to direct the jury that Dyke was entitled to possession at the date mentioned in the writ. The jury would have to find that. Then what would be the effect of their affirming in your favour on the equitable plea? It was the intention of the Legislature that it might go as an issue to the jury whether the facts alleged in the equitable plea are proved to their satisfaction, and that after the passing of this Act of 1855-6 the strict legal right to recover at a date mentioned in the writ shall not prevail against the equitable right to hold, if that equitable right to hold is set up and proved to the satisfaction of a jury. (GWYNNE, J.—Then the Legislature, if that was their intention, should have carried it out and substituted a different formula for actions of ejectments. One Act says the proceedings in ejectments shall remain as in 1853, and the other says that a plea shall be applied to it, which is altogether inconsistent with that formula. If the Legislature wished to abolish the form of ejectment—which is a model of simplicity and looked upon in England as the perfection of legal science—and to give another process, let them do it, and say that a person shall be allowed to plead equitable pleas instead of raising the issue prescribed by the Act of 1855-6, and I can understand it; but at present the two provisions are repugnant to one another.) I admit that by the Act of 1853 actions of ejectment are reduced to the simplest

possible form. But the Legislature, feeling that great injustice might be done—perhaps having reference to the particular circumstances of this community, in allowing a plaintiff to recover in every case, on proving his own legal title, without regard to the justice of the case or equities that might be outstanding—thought fit to say by the Act of 1855-6 that if the defendant can undertake to show that he has a good equity—(GWYNNE, J.—By plea—it is shown by plea.) There is a clause which says that a jury may find a special verdict. (GWYNNE, J.—The question is not the same. The question contemplated by s. 153 is whether the plaintiff is entitled to the legal possession. If you put an equitable plea, the issue is different. You necessarily destroy the existing form of action, and remodel it. I don't think we have power to do that without special legislation. If the Legislature intended that, they should have provided the machinery. It is not for this Court to assume the functions of the Legislature, and remodel the Act. Suppose this case went to trial, there must be two issues if you plead equitably, and then there would be no mode of entering up judgment.) The question under the Act of 1853 would be whether the plaintiff was entitled to the land on or before the date fixed. By the Act of 1855-6 the Legislature say in substance that the plaintiff shall show not only that he is entitled to the legal right on the day fixed, but if an equity is set up in reply to his title shall show that equity is not good against him. That is following, with regard to ejectment, what is the tendency of modern law reform, generally to get rid of technicalities as far as possible. (WEARING, J.—But here you might have obtained an injunction, might you not?) That is putting the *onus* upon the defendant instead of the plaintiff. The step that I intended to take was to show that whatever technical legal title the plaintiff might have, the defendant ought to be allowed to hold possession against him. (HANSON, C.J.—What do you say as to the *laches?*) First, that the amendment could have been made at any time up to the hearing; and, secondly, that the Judge who heard the application had settled that by imposing terms. (GWYNNE, J.—If the facts had happened since, that would have been sufficient.) I have become acquainted since the writ with facts that would enable equity to be set up successfully.

HANSON, C.J.—I think the *laches* alone is sufficient reason for refusing leave to plead.

GWYNNE, J., and WEARING, J., concurred.

Rule absolute.

HANSON, C.J., GWYNNE, J., WEARING, J.] [COMMON LAW.

8 NOVEMBER, 1870.

MANDER v. HUTTON.

SECOND TRIAL.—Costs—Practice.

On a second trial of a cause, where costs are not mentioned, the ultimately successful party is entitled to costs of both trials.

ON the first trial of this cause the plaintiff was nonsuited, but on the case being tried a second time, he was successful. The question of costs not being referred to in the rule, the Master refused to allow plaintiff's costs of first trial.

Stow, Q.C., now sought direction of the Court. The Master's ruling is according to the English practice here, but the Court has adopted a different one, which is considered fairer, and it is always understood when costs are not mentioned, that costs of both trials abide the event. He had been prevented on two occasions from arguing to the contrary, because the practice was established.

Per curiam.—The rule as stated by *Mr. Stow* is the best, and should be adhered to.

HANSON, C.J., GWYNNE, J., WEARING, J.] [COMMON LAW.

1 DECEMBER, 1870.

GERVASI v. RIGAMONTI.

NE EXEAT COLONIA.—*Affidavit.*

An affidavit in support of an application for an order for a writ of ne exeat colonia *should set out the facts from which the inference of intention of the debtor to abscond might be drawn with particularity, and it is not sufficient to state a belief in such intention from information received from a third party.*

THE parties in this case, two Italians, had been engaged in the occupation of charcoal-burning at Wallaroo. Disputes arose between them. A bill was filed and an order obtained on the 10th September referring all matters and differences between the parties to arbitration. On the 25th of November the defendant was arrested in Adelaide on a writ of *ne exeat colonia*, issued out of the Supreme Court at the instance of the plaintiff, and on his affidavit that the defendant being indebted to him in the sum of £145, the amount of the award, had disposed of his business as a charcoal-burner, and was in Adelaide with the intention of proceeding to Melbourne by the steamer "Penola," which was advertised to sail on November 23; that he knew from the statement of the defendant himself as to the sale of his business; and, as to his leaving the province, from information received from Georgio Bartieri, charcoal-burner, late in the employ of the defendant, and from seeing the defendant in Adelaide with his luggage.

Stow, Q.C., for the defendant, now applied to set aside the writ, and that the order of WEARING, J., on which it was founded, should be discharged with costs.—No equitable debt is shown. The affidavit on which the writ was granted was insufficient. It showed no intention of the defendant to leave the colony permanently, and the plaintiff had not sworn positively to any intention to leave the colony or any threat of that nature. The authorities show that it is necessary that the grounds of belief of the intention to leave the colony should be stated with particularity. It is not sufficient to show belief, and even if the affidavit has been positive, its allegations were entirely disproved by the

evidence of the defendant, who in an affidavit denied that he intended or ever intended to leave the colony, or that he made any statement of the kind to Bartieri, and stated that the luggage referred to consisted of a small carpet-bag containing a change of linen and papers connected with the case, which he had brought to town with a view of consulting his lawyer—

Sichel v. *Raphael*, 4 L.T., 114
Oldham v. *Oldham*, 7 Vesey, 410
Jones v. *Alephsin*, 16 Vesey, 470.

Barlow, for the plaintiff, in support of the writ.—

Great Northern Railway v. *Shepherd*, 8 Exch., 30,

shows that a carpet-bag might be considered luggage. (HANSON, C.J.—Have you any case to show that such a statement as that made here has been held sufficient—a statement that the defendant knows from information received, and not stating the information he received?) I have not a case distinctly upon that point. The writ has been regularly issued—

Amsinck v. *Barklay*, 8 Vesey, 594
Russell v. *Ashby*, 5 Vesey, 96
Flack v. *Holin*, 1 Jac. & W., 414
Jones v. *Alephsin*, 16 Vesey, 470
McGauran v. *Furnell*, 3 Chitty's Eq. Index, 2556
Boehm v. *Wood*, T. & R., 342
Whitehouse v. *Partridge*, 3 Swans., 374
Darley v. *Nicholson*, 2 D. & W., 86.

He read an affidavit by Bartieri stating that he had heard Rigamonti say in the plaintiff's presence that he intended to leave the colony when his contract was finished. If the Court should be against him, he applied that it should be the order that security should be given, and no action be brought.

Stow, Q.C., in answer to the case of *Russell* v. *Ashby*, referred to *Hannay* v. *McEntire*, a later case, which overruled the former decision that belief of intention to leave was sufficient.

HANSON, C.J., said the Court thought the writ must be discharged, as the affidavit of the plaintiff upon which it was obtained not merely failed in not stating the facts from which the inference of the intention of the defendant to leave the colony might be drawn, but it contained statements so framed as to lead to a false inference as to the nature of the information he had received. The writ would therefore be set aside, and they did not feel disposed to interfere to prevent the defendant claiming any compensation; but if a reference were consented to, to enquire what should be the amount of damages, they would restrain the defendant from bringing an action. The damages would be the costs.

Writ set aside.

HANSON, C.J., GWYNNE, J., WEARING, J.] [COMMON LAW.

12 DECEMBER, 1870.

DARWENT v. LLOYD.

LAND GRANT.—Map—Survey Pegs.

Where a land-grant conveys a section as delineated in the map of a certain survey, it cannot, on action brought for trespassing thereon, be set up for defence that according to the survey pegs from which the map was prepared, the land, the subject of the action, was improperly shown in such map as forming portion of the section granted, whereas such land, according to such pegs, formed portion of another section, which had been subsequently granted to the defendant, the land grant and map being conclusive as to the plaintiff's title.

Necessary possession under the Statute of Limitations commented on.

THE action was for trespass to a piece of land which the plaintiff alleged to form part of Section 782, Hundred of Noarlunga, and was tried at the November Civil Sittings before WEARING, J.

On the trial the defendant, in answer to plaintiff's possession produced a land grant of Section 781, which by the diagram and the map referred to, produced from the Land Office, showed the

locus in quo to be included. In reply the plaintiff relied—first, on proof that the piece of land was surveyed as part of 782, and the plan referred to in the defendant's grant was incorrect; and secondly, twenty-seven years' possession.

On the trial the learned Judge was of opinion that the grant and plan were conclusive, and that there was no evidence of a statutory possession, and directed a verdict for the defendant.

Boucaut, for the plaintiff, now moved for a rule for a new trial. He admitted that by the land grant the land would be in the defendant's section; but there were witnesses to prove that by the pegs it was in Section 782. (GWYNNE, J.—Suppose a person cuts up land into allotments, and by deed he clearly conveys to somebody allotments 1 and 2. The deed could be reformed by a bill in equity; but so long as the deed remained a Court of Law would be bound by it.) No doubt of that; but supposing there was a little variance, as there must be in surveys in hilly districts. (HANSON, C.J.—Suppose it was proved in the clearest way that the surveyor laid out this *locus in quo* as part of Section 782, is the Government so bound by that that they cannot alter it for the purpose of selling?) I would not say that they were. (HANSON, C.J.—Then the evidence is that they did alter it here, because they conveyed it. I understand you to say that a deed executed by the Government which purports to convey land does not convey it because somebody in the employ of the Government as surveyor previously had placed the pegs in a manner inconsistent with the conveyance.) Then there is the other point. He had shown continuous possession for over twenty years, and on that ground the plaintiff was entitled to recover. The evidence relied upon was that in 1846 the Lloyds, when they went up to look at the section before buying it, found Mr. Lewis in possession, and that shortly afterwards Mr. Arthur Foster Lloyd and Mr. Lewis agreed to a boundary fence, which included the *locus in quo* with Section 782, and that the plaintiff had exercised acts of ownership by running cattle on the land and felling timber. (HANSON, C.J.—It would be a hard thing if a person, having unfenced land, because he has not impounded all the cattle off it, is to be told that the person

whose cattle have been running there holds possession against him.) There is more than that. (GWYNNE, J.—There must be twenty years' continuous possession; and if by different people, it must be shown that there was privity of estate between them.) The fixing the boundary-line showed an acquiescence by the defendant's predecessors. (HANSON, C.J.—Was the evidence precise as to when he felled the timber?) No.

HANSON, C.J.—Then how can you say there was continuous possession? Unless there is something that will tell the real owner that somebody else is in possession, and holds it adversely to him, it amounts to nothing.

GWYNNE, J—If I have a wild section, I go down there, find a quantity of cattle upon it, look about and see nobody, and can hear nothing about it, and perhaps the same thing is repeated. Surely this trespasser could not defy me, and say he occupied by repeated trespasses. It seems to me it must be reasonable possession—something by which the person may know that his title is in jeopardy. In England it is one thing, but the application of the rule here must be somewhat different—I don't say the principle.

WEARING, J.—I think it would be very dangerous to extend the rule with regard to occupancy and prescriptive title.

Rule refused.

12, 13, 14, 19, 21 OCTOBER AND 13 DECEMBER, 1870.

CHERRY AND ANOTHER v. NATIONAL BANK OF AUSTRALASIA.

EQUITY.—Relief—National Bank Act, 1859—*Merchant Shipping Act*, 1854.

The plaintiffs, assignees of an insolvent, alleged in their bill that the defendants, being a Banking Company incorporated and regulated by the National Bank Act, 1859, *had, in violation of section* 7 *of such Act, taken from the insolvent as security by way of mortgage a certain ship, the property of the insolvent, to secure a present advance, and that the defendants afterwards seized and sold the ship under the mortgage. The prayer was for a declaration that such seizure and sale was illegal, and that the defendants be ordered to pay the value of the ship, with interest, and compensation for the loss of possession.*

Held—*That the bill disclosed no case remediable in Equity, an action at law for wrongful seizure, &c., being the proper course.*

Quære—*Whether section* 7 *of the National Bank Act*, 1859, *is not* ultra vires?

THE material facts set out in the bill were that the plaintiffs were assignees of Samuel White, an insolvent, and the defendants a Banking Company incorporated and regulated by the National Bank Act, 1859; that White, prior to his insolvency, in February, 1865, requested the defendants to lend him £12,000, which they consented to do, and took from him as security a mortgage on the steamer "South Australian;" that the mortgage was recorded by Charles Parry, professing to act as Deputy Registrar of Port Adelaide; but that as there was at the time a Collector of Customs and a Comptroller of Customs, this mortgage has not been recorded as required by the Merchant Shipping Act; that an arrangement had been made between White and the defendants, that White should pay off £2,000 of the loan, and give a new mortgage for the balance of £10,000; that White paid the £2,000, executed a new mortgage for the £10,000, and tendered the same in exchange for the old mortgage, but that the defendants refused to carry out the arrangement and seized the ship in Melbourne, whereby White was greatly injured in business, and became insolvent; that the ship had been sold by the defendants after seizure for £11,500, being a sum far below its value. The plaintiffs alleged that the

mortgage was illegal and void, as being contrary to the Act under which the Bank was incorporated. The prayer was that the seizure might be declared illegal; that account should be taken either of the £11,500 and subsequent interest, together with the damages caused by the seizure, or an enquiry of what would have been a fair price for the ship; and that the defendants should be decreed to pay the plaintiffs such a sum with interest, and damages as assessed. The defendants by their answer alleged that some time in the year 1864 they received for collection two bills of exchange, drawn by Alexander Calder and H. A. Coffey for the Marine Investment Company, London, upon Samuel White, each for the sum of £5,750 15s., payable at six and twelve months after their respective dates, which were secured by a mortgage of the steamer to the Marine Investment Company, and that on the 17th of February, 1865, the Bank at Adelaide paid off the said bills by discounting White's promissory-note for £12,000; and that they did not at the time of advancing the £12,000 but they did afterwards, on the 18th day of February, take a mortgage of the steamer "South Australian" as security for a liability incurred previously; that Kirkcaldy, Scotland, was the port of registry, and not Adelaide. The answer set out at length the negotiations between Mr. Prole, an officer of the Bank, and Samuel White in reference to the reduction of his overdraft and the execution of a mortgage for £10,000, to be exchanged for the mortgage of £12,000, but they denied that such mortgage was binding either upon them or upon Samuel White, and repudiated the arrangement entered into by Mr. Prole as to the mortgage for £10,000.

The evidence had been taken in the usual manner, and the cause now came on for hearing. On the reading of the evidence, a copy of the mortgage was produced, and stated to be that which the parties had agreed before the Master should be taken as evidence instead of the original. As to the mortgage itself, there was no contest; but on the defendant proposing to refer to the certificate of registry by the Shipping Registrar of Kirkcaldy,

Stow, Q.C., for the defendant, objected that the registration could not be referred to, as it had not been proved.

Way, for the plaintiff, contended that the parties having agreed to a certified copy being used, the signatures were admitted, and further that the registration being an essential part of a valid mortgage was in fact part of the document which was admitted.

Stow, Q.C.—The certified copy did not dispense with anything but the production of the original, and the admission of the mortgage as evidence would not be an admission of any endorsement upon it.

GWYNNE, J.—The registration must be proved.

Way thereupon applied under the 81st section of the Equity Act, to be allowed to call a witness to prove the signature of Mr. Flemming, the Registrar.

Stow, Q.C.—The proof of registration at Kirkcaldy would be directly contrary to one of the cases made by the bill, which was that the ship should have been, but was not, properly registered at Port Adelaide.

Way.—The registration at Kirkcaldy was not inconsistent with the plaintiff's case, founded upon the illegality of the mortgage by the Act of Incorporation. The allegations in reference to registry at Port Adelaide were drawn under a misconception, but they were at liberty to have them struck out, and there was still sufficient in the bill to allow them to give evidence of the registration at Kirkcaldy—

Carew v. *Johnston*, 1 Sch. and LeF., 280
Ferguson v. *Wilson*, 2 Ch. App., 77
Daniels, 659.

As to an objection that an addition to the evidence would not be allowed after the hearing had commenced, but only while the case was before the Master, see the 79th, 80th, and 81st clauses of the Equity Act, and—

Raymond v. *Brown*, 5 Jur., N.S., 1046
Smith v. *Edwards*, 1 W. R., 18
Chichester v. *Chichester*, 24 Beav., 289
Lord v. *Colvin*, 3 Drew., 222
Daniels's Chancery Practice, 793, 845, and 1674

GWYNNE, J.—The evidence will be admitted, for the purpose of the plaintiff's equity, founded upon the violation of the charter; the allegation affecting the other equity may be regarded as immaterial.

The evidence having been given accordingly,

Strangways, *Way*, *Thrupp*, and *Barlow*, for the plaintiffs.—The mortgage of the steamship "South Australian" was in violation of the express provision of the Act of Parliament under which the defendants were incorporated, and consequently the security is absolutely void. There could be no doubt that the loan of the money on the promissory note of Samuel White, and the giving of the mortgage by him over the ship "South Australian," was one transaction. The two acceptances to the Marine Investment Company bore the Bank stamp of having been paid on the 18th February, 1865, which was the same date as the mortgage; but even had the money been paid on the day previous, with the understanding and condition that as security for the loan White was to give a mortgage the following or any subsequent day, that would be regarded in law as one transaction, and the Court would not construe an Act of Parliament in such a way as to enable the defendants by a subterfuge to violate its provisions. (GWYNNE, J.—I don't think Mr. Young denied that it was understood when he advanced the money that he was to have the mortgage.) He did not deny it, but equivocated about it. The evidence of Mr. White was much stronger, and showed clearly that the money was lent upon the mortgage, and that the bill was, at Mr. Young's suggestion dated back. It had been suggested that the plaintiffs' proper remedy was trover, but

Ramshire v. *Bolton*, L.R., 8 Eq., 294
Holderness v. *Lamport*, 29 Beav., 129
Story, sec. 462 to 468,

show that they might be entitled to equitable relief at the same time as they had a complete remedy at law. Even if the loan was only in contemplation of the security being given, that would be a violation of the Act of Incorporation. It was immaterial whether the mortgage was given at the time or contemplated at the time of

the loan. The plaintiffs would be entitled to the alternative relief either of having accounts taken of the proceeds of the sale or of the value of the ship, and were entitled not merely to the proceeds of the sale, but to be placed in the same position as they would have been if the wrong of selling the ship as it was sold had not been done the estate. That they were so entitled—

De Mattos v. *Gibson*, 1 J. and H., 79

showed. A point has been raised that the sale of the ship has not been proved to have been in compliance with the Merchant Shipping Act; but a sale having taken place, unless anything appeared to the contrary, it must be presumed that the sale was properly made. (GWYNNE, J.—If it was not, it was the parties' own fault, as it was registered.) The whole purport of the Merchant Shipping Act is to give a secure title to a purchaser, based upon the principle that the register shall be the document which the purchaser has to look at, and that if he looks thoroughly to that, in the absence of warnings on the face of it, he can take a title with perfect security. (GWYNNE, J.—It is subject to any rights and powers appearing on the register.) The whole principle of the Merchant Shipping Act is to give the purchaser an indefeasible title when he takes as an innocent purchaser, and the Court would not stretch the doctrine which the counsel for the defendants laid down, so as to shake the title: and although from the nature of the transaction the mortgage by White to the defendants was not one that was valid as between them, yet there was nothing on the face of it or the transfer to invalidate the transaction so far as the purchaser was concerned, because the mortgage did not show that the money was advanced at the time. It was not like the case of

Orr v. *Dickinson*, 28 L.J., Ch., 517.
John, 1.

(GWYNNE, J.—If a person, looking at the register and seeing no encumbrance, procures himself to be registered as mortgagee of a ship, in the absence of fraud he is absolutely free from any encumbrance, power, and interest unless they appear upon the register. The only exception in my opinion is where there is fraud. Unless

the register were final as to the right of property, no one could deal safely in ships.) Then as to equitable relief, if the ship were sold for £10,000, and its value was £20,000, an action of trover would not afford them compensation, especially as they were also entitled to the advantage of contracts which had been entered into; the time of sale being one when, on account of the New Zealand diggings, it was calculated she could have made a profit of £2,000 a voyage. (GWYNNE, J.—It may be that you could maintain trover against the Bank. I don't know.) But we should still have concurrently a remedy in Equity. We ask for a discovery and accounts to be taken—

Ryle v. *Haggie* 1 Jac. & W., 234
Brandon v. *Johnson*, 2 Ves. jun., 516
Ryal v. *Roberts*, Barn., 38
Cupit v. *Jackson*, 13 Price, 731
Weymouth v. *Boyer*, 1 Ves. jun., 416
Macnee v. *Gorst*, L.R., 4 Eq., 315
Jewan v. *Whitworth*, L.R., 2 Eq., 692
Attwood v. ——, 1 Russ., 361 (referred to in Daniels, 370)
O'Brien v. *Irwin*, 2 Chitty's Equity Digest, 1650
Simpson v. *Lord Howden*, 3 Myl. and Cr., 97
1 Daniels, 510.

The Bank had power under the Act of Incorporation to hold ships and land "for reimbursement only, and not for profit," and only "until the same can be advantageously disposed of." The Bank held this ship for a long time, contrary to the direct words as well as the scope and policy of the Act—

Kerr on Frauds, 320
1 Smith's Leading Cases, 347
Howard v. *Earl of Shrewsbury*, 2 Ch. App., 760.

Then, irrespective of being in contravention of the Act, there was another invalidity. It was a mortgage by a registered shipowner out of the place where the ship was registered, and under the 74th section of the Merchant Shipping Act a ship could not be mort-

gaged out of the port of register without a certificate from the Registrar at its home port—

Dickinson v. *Kitchen*, 8 E. & B., 789
Johnson v. *Royal Mail Steam Packet Company*, L.R., 3 C.P., 42
Williams v. *Allsup*, 10 C.B., N.S., 417
Collins v. *Lamport*, 34 L.J., N.S., Ch. 196
Marriott v. *Anchor Reversionary Company*, 3 DeG., F. & J., 177, 185
DeMattos v. *Gibson*, 1 J., & H., 85
The Feronia, L.R., 2 Admiralty, 72
Gardner v. *Cazenove*, 1 H. and N., 423
Sugden, Vendors and Purchasers, 620.

Stow, Q.C., and *Boucaut*, for the defendants.—The plaintiffs have made out no case whatever for the relief of the Court of Equity. In the first place, the case for relief must be made out by the bill, and could not be supplemented by reference to the answer and evidence. That was the first principle which was stated in elementary works, such as Lewis's Principles of Equity Drafting and Drewry's Equity Pleading. The plaintiffs were bound to show first their title to the subject-matter, and then that they were entitled to the relief prayed—

Drewry, 7—10
Lewis, 182.

The plaintiffs showed neither by their bill. They showed no title whatever to the ship. The case for relief was shaped in two ways. It alleged that the defendants converted the ship to their own use, and were bound to pay over the purchase money; and it also alleged that the mortgage under which they seized and sold the ship was void. In order to entitle them to sue for money had and received, it was essential for them to show that the property was parted with under circumstances such as to confer a title on the purchaser. A conveyance under the Merchant Shipping Act must be by the owner, in a particular form prescribed by the Act. The plaintiffs were the only persons who could have executed such a conveyance, and they had not done so. It was impossible under

those circumstances to have made any title under the mortgage, which was absolutely bad, and would appear so on the face of it. That was assuming the plaintiffs' case. (GWYNNE, J.—I should say, with regard to the effect of the Merchant Shipping Act, that if a person who has the legal estate is on the register that would be sufficient, unless there is any equity outstanding which the Court would give effect to. That is the tendency of my mind, and I should assume that Messrs. Blackwood & McMeikan appear on the register as owners.) It will be shown when we come to that point, that you must look behind the register. It is only *prima facie*. (GWYNNE, J.—It seems to me, if they are registered there under this mortgage, the mortgage being good on the face of it—the Bank having power to take such a security for the pre-existing debt, which this might have been—then these men might have *bona fide* got upon the register, having the legal estate, and there being no equities outstanding against them.) Assuming the plaintiffs' case to be correct, the deed was utterly void, and not voidable only. According to the case made by the bill it must be a mortgage showing the real nature of the transaction as set out in the bill. It was not a case in which any option could be exercised. There was a personal incapacity, and therefore no title could be given. The corporation, for the purpose of such transaction, had no entity. The mortgage conveyed no estate, and if Messrs. Blackwood and McMeikan chose to get it registered, that was not the act of the defendants; and the registration of itself conferred no title. The Merchant Shipping Act said ships might be sold by an instrument in a form given by the Act. That was the mode of sale, and then they were to be registered; but the whole effect of the Act showed that registration was merely with the view of enabling the State or Government to see that properly qualified persons were owners. The Court might look behind the registration for the purpose of seeing whether the persons who were registered were owners. Then what did they find? They stood registered as owners under an absolutely void mortgage, and a pretended sale under that mortgage. That was all there was to found the right of those persons who were assumed to be registered owners as against Mr. White and the plaintiffs. Then that transaction was void in law. The case of *Orr* v. *Dickenson* showed that conclusively. The Real Property Act

was a registration of title; the Shipping Act was a registration of security. The registration conferred no title. It depended upon what went before, and that must be decided on the ordinary law with regard to the effect of legal instruments. Inasmuch as the mortgage was absolutely void, nothing that was done under it could confer any title whatever. The case of

Ridgway v. *Roberts*, 4 Hare, 106,

showed that a person who was not legal owner might have his name upon the register. See also

Stapleton v. *Haymen*, 33 L. J., Ex., 170.

Thus far assuming that this void mortgage had been made in the form given by the Act, and that it was duly registered. According to the case made by the bill it could not be assumed that there was a bill of sale in the form of the Act, nor that it was duly registered. The case made by the bill was that the ship ought to be registered at Port Adelaide, and that it was not registered at Port Adelaide, and that the sale or pretended sale was absolutely void upon that ground. The plaintiffs' answer to that was that they went upon two grounds—that the mortgage was bad under the Act, and that the mortgage was not registered; and on these grounds that the whole affair was void. But in order to rely on the first ground they must go further than the mortgage; they must show that the mortgage was duly registered, and that a transfer took place which would confer a title on a purchaser. But the presence of the allegation in the bill that the mortgage was not registered was an absolute answer to that. Even if it might be implied that the mortgage was registered, and everything done which was necessary to confer a title on the purchaser from the defendants, the presence of that would make the bill absolutely bad upon the face of it, as against one of the first principles of equity pleading—that a bill should not allege two inconsistent and contradictory sets of facts. The plaintiffs could not get rid of the statement that the mortgage was not registered. It was all very well to say they would abandon it. They might abandon the relief; but the bill was the plaintiffs' statement of the case; and if they

wanted to shape their case differently, the proper way was by amendment—

Rawlings v. *Lambert*, 1. J & H., 458.

Supposing the mortgage was taken to be registered, then it was essential to the plaintiffs' case to show that in the transfer the Statute had been followed out—

Walburn v. *Ingilby*, 1 Myl. & K., 61.

The mortgage they say is void upon the face of it. There was a suggestion that the Court should set it aside; but a Court would never set aside a document unless it was stated that the illegality did not appear upon the face of it—

Drewry 44, and
Simpson v. *Lord Howden*, 3 My. & C., 97.

The bill failed to show a title in the plaintiffs to the subject matter, and it failed to show any title to relief. Then, it might be said, it showed the plaintiffs were entitled to relief upon the ground that there was an illegal sale. That was a case thoroughly cognisable by a Court of Law, and in such cases Courts of Equity would not interfere unless some extraordinary ground for relief was made. Then upon what ground did the plaintiffs suggest they were entitled to relief? It was said because they offered to allow the defendants something, and because it was a case for discovery, and because a question of account was involved. But the plaintiffs did not come within the rules which give an equitable claim—

Brandon v. *Johnson*, 2 Ves., jun., 516
Story's Equity Jur., s. 71, 454, 481
King v. *Rossett*, 2 Y. and J., 33.

In illustration of the argument that a mortgage such as that alleged by the bill was beyond the capacity of the corporation, see

Attorney-General v. *Duplessis*, 2 Ves., sen., 286.

It was stated that the Bank was incorporated in South Australia and in Victoria. Then, as nothing appeared to the contrary, it

would be presumed—the Statutes of Mortmain not applying—that in Victoria it had power to hold lands. The bill did not allege that the contract was made in Adelaide, therefore there was nothing to show that the transaction was illegal, as a corporation established in one colony could sue in another colony. Then the plaintiffs show by their bill that there had been a subsequent transaction between the parties, which was perfectly valid, and would give the defendants a title if the first was void. It was also proved that part of the money had been advanced before the agreement for the first mortgage was made, and therefore the whole mortgage could not be invalidated. Another answer of the defendants was, that while the plaintiffs asked the Court to set aside the mortgage for which they had received £12,000, they made no offer to do equity. Unless they did that the Court would never lend them its assistance That was laid down by His Honor in the

West Kanmantoo Mining Company v. *English, Scottish, and Australian Chartered Bank*, 2 S. A. L. R., 102.

The plaintiffs, who through Mr. White had entered into the contract, could not take advantage of an alleged irregularity unless they offered to place the defendants in the same position as they would have been if they had not entered into the transaction. It was also incumbent upon them to show that there was no liability whatever when the mortgage was given. It was proved, however, that the ship was previously mortgaged, and that the Bank held two bills of Mr. White's amounting to several thousand pounds. Those bills were in possession of the Bank at the time the transaction took place. The money in fact was never advanced, but Mr. White was released from his liability to the defendants upon the bills. If a man owed £10,000 in bills and gave a mortgage, that was not an advance, and was not against the policy of the Act or against the words of the Act. It was a security for an amount owed to the defendants, and if they chose to release other parties that was not against the policy of the Act. So that the possession of those bills by the Bank entirely negatived the plaintiffs' case. If the deed was good for any sum whatever it could not be said to be void, and therefore, apart from other considerations, the case would fail—

Chitty's Equity Index, 916
Story's Equity Juris., 64*e*
Phillips v. *Phillips*, 9 Hare, 471
Fluker v. *Taylor*, 3 Drew., 183.

Way, in reply.—The argument for the defendants consists mainly in a demurrer to the plaintiffs' bill or a statement of the points upon which it might be said to have transgressed the rule as to equity drafting. The question was not whether the bill was artistically framed, but whether it was so defective that the Court was unable to arrive at a conclusion upon the facts on which evidence had been taken. The argument that the plaintiffs alleged no title to the ship was answered by the fifth paragraph, where it was alleged that a mortgage was taken over the ship "South Australian," "of which the said Samuel White was the owner." The bill alleges that the mortgage was invalid on the face of it, and the mortgage showed itself to be valid on its face. The mortgage was included as part of the record, and a demurrer must be decided by reference to the whole record. There were cases, some of which he cited, in the first instance, which showed that although pleadings might have been demurred to and successfully, yet when evidence had been taken, the Court would stretch the meaning of the bill to its utmost possible tension to enable the case to be decided without the expense of taking evidence over again. The Court was not to be bound by that which was untrue; but on the authority of Lord Redesdale, the pleadings, answer, and demurrer were all machinery for the purpose of ascertaining the facts, and it would require a much stronger case than the defendants' to prevent the Court dealing with the facts—

Carew v. *Johnson*, 2 Sch. and Lef., 306
Attwood v. ———, 1 Rus., 353
Attorney-General v. *Whorwood*, 1 Ves., 534

referred to in Daniels' Chancery Practice, 370 and 442. It was said that the plaintiffs alleged Port Adelaide was the port of register; but on reference to the bill it would be found that there was not one solitary allegation of that fact, though it was alleged that the *mortgage stated* that Port Adelaide was the place of register. Then

it was contended that under any circumstances no title could be conferred by virtue of the mortgage, because the mortgage was something *extra vires*, and therefore of no effect at all. If so, a mortgage might be made in proper form, the power of sale exercised, and the property transferred from one to another, and then Mr. White's assignees turn round and claim the ship from innocent persons. Such an argument would require stronger support than any of the cases quoted on behalf of the defendants. The cases of *Orr* v. *Dickenson* and *Bray* v. *Macdonald*, were quite distinguishable, and formed no authority for such a proposition as that they were used to support. The ground taken that the plaintiffs had a remedy at law was no answer to a bill in equity, as cases already cited showed that Courts of Equity had in many cases concurrent jurisdiction. The only question was whether circumstances existed which brought this case within the ambit of equitable jurisdiction. The presence of fraud—constructive fraud of the Act of Parliament—did so; and though the Court would not interfere where there were two persons *in pari delicto*, that was to say, *inter se*, this was taken out of that rule by the fact, as decided by the Privy Council, that the operation of the Act was a matter of public policy The agreement between White and the Bank was in derogation of. the express terms of the Act of Parliament; but the assignees of White were not *participes criminis*, and therefore a Court of Equity would give them relief. They were not seeking to take advantage of the fraud. They were seeking relief against it, and claiming that the property of the estate should be equally divided among the creditors, in which case the Bank would come in as any other unsecured creditor. The suit was an endeavour on the part of the plaintiffs to further the policy of the law, which said that although money might be lent by the Bank, they should not take the security. The Court would be able to do justice between the parties upon the record as it stood; the merits, as far as the defendants were concerned, were of a most shadowy character. They said the plaintiffs were not entitled to relief because the Bank held the bills given by Mr. White to another corporation. But they were not the owners of the bills. They were sent by the London office for collection, and were not debts due to the Bank at all. Therefore on the merits they utterly failed, and left the allegation of the bill

uncontradicted, that there was a loan of £12,000 made by the Bank, and they took the security over the ship "South Australian" in direct contravention of the Act of Parliament.

Cur. ad. vult.

13 December—

GWYNNE, J., delivered judgment as follows.—The plaintiffs in this suit are the assignees of Mr. Samuel White, formerly of Aldinga, in this province, miller, who became insolvent on the 8th of October, 1866. The bill represents a variety of circumstances, many of which were not only not proved, but absolutely disproved. To these I shall not further refer. The bill, in truth, is very loosely drawn, and I shall not attempt to give at large even its material statements, but shortly point out the case upon which the plaintiffs seemed to me to rely for equitable relief. Their case, so far as the statements of their bill enabled me to identify it, amounts to this:—That the defendants are a Joint Stock Banking Company, carrying on business in Adelaide, incorporated and regulated by an Act of the Parliament of this province, passed in 1859, and entitled "An Act to regulate and provide for the management of the South Australian Branch of the National Bank of Australasia, and for other purposes;" that in the month of February, 1865, White was the owner of a British ship built at Kingston, in the County of Fife, Scotland, and named "South Australian;" that White being a customer of the defendants, applied to them for the loan of £12,000 upon the security of the said ship; that the defendants having agreed to his request advanced him the money, and on the 18th of February, 1865, a mortgage in the form prescribed by the Merchant Shipping Act, 1854, was executed by White to the defendants; that on or about the 9th September, 1866, the defendants professing to act under the said mortgage, forcibly took possession of the said ship, then lying in the port of Melbourne, in Victoria, and afterwards sold her to certain merchants in Victoria for £11,500. The bill winds up with the following charge:—"The plaintiffs charge that, under the circumstances thereinbefore stated, the said ship was unlawfully seized and sold by the said corporation, and that the said corporation is accountable to them at their option,

either for the proceeds of the said sale with interest thereon from the time of sale at the rate of eight per cent. per annum, or at such higher rate as might have been obtained by the said corporation for any balance of the said purchase-money not paid at the time of sale, together with a reasonable sum for the detention and use of the said ship." The prayer is, "That it may be declared that the aforesaid seizure and sale was illegal, and that certain specified accounts may be taken." Now the contention of the plaintiffs is, that a transaction of this kind is struck at by the Act of Parliament, under which the defendants are incorporated, and they rely upon the 7th section of the said Act. That section provides that it shall be lawful for the corporation to take and hold, but only until the same can be advantageously disposed of, for reimbursement only, and not for profit, any freehold or leasehold lands and hereditaments, and any real estate, and any merchandise and ships which may be taken by the said corporation in satisfaction, liquidation, or discharge of any debt due to the said corporation, or in security for any debt or liability *bona fide* incurred, or come under previously, and not in contemplation or expectation of such security. And I am disposed to say that the evidence given on the hearing of this case strongly inclines me to the opinion that the mortgage in question was given for a present advance, and that the giving of the mortgage of the ship was an item of stipulation in the agreement for the advance of the £12,000. It would therefore follow that the mortgage under the circumstances was *ultra vires* the Bank; and, adopting the principles laid down by Wood, V.C., in the case of *Orr* v. *Dickenson*, 28 L.J., Chan., p. 516; and also 1 Johnson, p. 1, it would seem to follow that, notwithstanding the Bank registered their mortgage at Kirkcaldy, in Scotland (the home port of the ship), yet they did not become registered mortgagees within the meaning of the Merchant Shipping Act, 1854, any more than a person claiming under a forged mortgage, though registered, could be a registered mortgagee, and consequently that (notwithstanding the sale) the legal estate of the ship still vested in the plaintiffs. These startling consequences suggest another important question—Was it competent for the Local Parliament to place the restrictions contained in section 7 of the Act upon the Bank? The 37th section of the Merchant Shipping Act, 1854,

provides that bodies corporate may be registered as owners by their corporate name. It further, by s. 66, 67, 68, 69, 70 prescribes the conditions upon which ships or shares in them can be mortgaged; and by s. 71, enacts that every registered mortgagee shall have power absolutely to dispose of the ship or share in respect of which he is registered, and to give effectual receipts for the purchase-money. By the 547th section of the Merch ant Shipping Acts, 1854 the legislative authority of any British possession shall have power by any Act or Ordinance, *confirmed* by Her Majesty in Council, to repeal wholly or in part any provisions of this Act relating to ships registered in such possession; but no such Act or Ordinance shall take effect until such approval has been proclaimed in such possession, or until such time thereafter as may be fixed by such Act or Ordinance for the purpose. Now, it would seem to me that matters stand thus:—The Imperial Act (Merchant Shipping Act, 1854) provides that a mortgage in the form prescribed by the Act executed by the owner of the ship, and properly registered by the mortgagee, shall vest in such registered mortgagee power absolutely to dispose of the ship; the local Act, however, declares the corporation incapable of being a mortgagee. No mere registration could confer on them the character of mortgagees; therefore the corporation were never registered mortgagees, and consequently had no power to sell or otherwise dispose of the ship. Fortunately for me, it is not necessary that I should decide the above question, nor the effect, the Validating Act, 28 and 29 Vict., c. 63 would have upon it. I shall, however, assume for the purposes of this judgment that the £12,000 was granted in expectation and anticipation of the mortgage, and that such mortgage was therefore void. Looking at the record, it seems to me that the plaintiffs' case is in reality a mere claim for compensation for the unlawful seizure and conversion of their ship by the defendants. The plaintiffs' counsel, however, argued very stoutly that the plaintiffs had abundant grounds for the equitable relief prayed for by their bill. They insisted that they brought the plaintiffs' case under the equitable heads of fraud, account, and discovery, or some or one of them. I confess, however, that I was unable to acquiesce in the learned counsels' views as to the plaintiffs' title to relief—First, as respects account, they show no case of complication of accounts, not even

mutual accounts, and certainly cannot set up any confidential relation between themselves and the defendants, whom they describe as trespassers and wrong-doers. In my opinion, therefore, the accounts between the plaintiffs and defendants could as well be taken at law as in equity. Then it was contended that taking such a mortgage by the Bank was a fraud on the Act. No doubt upon a properly framed Bill, where the purchasers of the ship were made parties, praying that the mortgage might be declared null and void as a fraud upon the Act, and that it might be delivered up to be cancelled, this Court would have interposed. But even then it appears to me that the plaintiffs could have the assistance of this Court upon the terms only of offering to pay back the £12,000 and interest. Then, with regard to discovery, there is not a single statement, averment, or suggestion in the bill that the plaintiffs required discovery. And certainly they could not have it against the corporation, nor could they have discovery as against a witness; and if they had desired it against the corporation, they should have made Mr. Young or some other officer of the corporation, a defendant to the suit. In my opinion the bill shows no case remediable in equity, and it must therefore be dismissed; but as the defendants have answered, and thus compelled the examination of witnesses and the hearing of the cause, it will be without costs.

Bill dismissed.

HANSON, C.J., GWYNNE, J., WEARING, J.] [COMMON LAW.

7 JUNE AND 16 DECEMBER, 1870.

LAWSON v. HILL.

ENTRY.—Rent—Trespass.

Where rent is made payable at a particular place, or in default right of re-entry, on default made, no demand is necessary before re-entry.

The action was in trespass. The plaintiff was tenant of the defendant of the land the subject of the action. The rent was

payable at Langhorne's Creek, and in default of payment for thirty days the defendant had a right of re-entry. Default was made, and the plaintiff having shut up and left the premises, the defendant took possession without making any demand of the rent.

On action brought in the Local Court of Strathalbyn, a verdict was found for the plaintiff.

A rule nisi to set aside the verdict having been obtained,

Way, for the plaintiff, showed cause.—There was no demand made for the rent, and therefore, there being no words in the agreement dispensing with it, ejectment could not be maintained, and the eviction would be unlawful—

Woodfall's Landlord and Tenant, 293, 295, 296, and 872.

Stow, Q.C., for the defendant.—Supposing the entry to be proved, it would not amount to a breach of the agreement. The act of the defendant would be authorized, because the plaintiff had broken his agreement formerly. Throughout it was admitted the rent had not been paid. Then the defendant, as lessor, acted upon the breach of the agreement, and entered the land, and yet the jury, in the face of that, were directed that the whole proceeding was unlawful, and gave damages to the extent of £40. The quotation from Woodfall was inapplicable, there being a certain place fixed for payment of the rent, which dispensed with any demand.

Cur. ad. vult.

16 December—

HANSON, C.J.—This was an appeal from the judgment of a Local Court. The question was whether the defendant Lawson was liable in an action of trespass for wrongful entry upon the premises in question. They had been demised by written agreement for a term of years to Hill; but as the agreement was not under seal, there having been payment of rent, it operated only to create a yearly tenancy upon the terms of the agreement. The agreement provided that the rent should be paid at a particular place, Langhorne's Creek, and that if the rent was not paid in thirty days the

landlord should re-enter and take possession. It appeared from the evidence of the plaintiff that he had left the premises, shut them up, and gone to live at a distance, and that he would not be back from there until the thirty days had expired, and the defendant had taken possession. We think, the rent being made payable at a particular place, a formal demand was not necessary, and that the defendant was entitled to a verdict. There will therefore be a new trial.

Rule absolute.

HANSON, C.J., GWYNNE, J., WEARING, J.] [COMMON LAW.

20, 21 JULY, 16 DECEMBER, 1870.

WARREN v. NORTHERN INSURANCE COMPANY.

INSURANCE POLICY.—Condition precedent—Waiver—Questions for jury.

Where a policy of insurance required certain particulars of property destroyed to be given by the insured as a condition precedent to his recovering, the question of the sufficiency of these particulars—there being no conflict of evidence on the point—is one of fact for the jury and not of law for the Court. A policy of insurance provided that persons insured sustaining damage by fire should within fifteen days from the date of the fire deliver an account, stating the loss or damage as particularly as the nature of the case would allow, and should make proof by declaration, &c., and that until such declaration, &c., were produced, the insurance money should not be recoverable. No sufficient particulars were sent within fifteen days, and afterwards a form of particulars required, and declaration were sent by the defendants to the plaintiff for him to fill in and declare, and other particulars were afterwards asked for by the Company and furnished.

Held.—*That the delivery of the particulars and declarations were conditions precedent, which, however, had been waived in point of time. That the sufficiency of the particulars was a question for the jury.*

THIS was an action on a policy of insurance against fire. The cause had been tried before HANSON, C.J., at the June Civil Sittings, when a verdict was entered for the plaintiff, the questions of law being reserved for the Court. The principal point was

whether the plaintiff had complied with the 11th condition of the policy, which was in these terms:—"Persons insured sustaining any loss or damage by fire are forthwith to give notice thereof to the office in Melbourne, or to the agency from which the policy has been obtained, and within fifteen days from the date of the fire an account is to be delivered stating the loss or damage as particularly as the nature of the case will allow; and proof thereof shall be made by the oath or affirmation of the claimant, and by the production of his books of account or such other vouchers as may reasonably be required; and until such declaration, or affirmation, account, and evidence are produced, no part of such loss shall be payable or recoverable; and in no case shall profit of any kind be included in such claim. All loss when satisfactorily ascertained will be paid or made good within sixty days of the date of adjustments, without deduction or discount; but if there shall appear any false swearing, fraud, or wilful misstatement, or if no claim be made within three months after the fire, or if made and rejected, shall not be judicially insisted on within three months after such rejection, or if the fire shall have been caused directly or indirectly by the means, contrivance, or wilful act of the insured, the claim shall be wholly invalidated." The fire occurred on December 7. The only particulars given within the prescribed time after the fire described the goods destroyed as the "reserve stock of a general store." After receipt of this claim on 23rd December, the defendants required an account of the articles, in reply to which the plaintiff stated that he was unable to do more than to forward a statement based upon a former stock-taking, reckoning his purchases and sales since, from which he made out a loss of £1,452. This not satisfying the defendants, the plaintiff placed his accounts in the hands of competent persons, who went through them and made the loss £1,452 2s. 10d. This again did not satisfy the defendants, who required detailed items of the goods burnt, or if he could not do that, his stock-sheets and particulars of all goods taken in and out. This was given accordingly. There was no conflict of evidence as to the particulars which the plaintiff could give.

The Judge directed the jury to consider, firstly—whether the condition as to particulars had been complied with; and secondly—if not, whether it had been waived.

The jury having found for the plaintiff, on a subsequent day

Stow, Q.C., for the defendants, moved for a nonsuit or new trial, on the grounds that no particulars had been given as required by the policy; that there was no evidence of waiver; that there was no evidence of waiver by the parties capable of waiving, and in the manner in which they were entitled to waive, because the contract being one that must be in writing could only be waived in writing; that if there was a waiver it was on a condition, and the condition had not been fulfilled. The waiver must be in writing—first, because the policy of insurance could only be in writing; second, it was required by the Statute of Frauds; third, it was a contract which, by the admission of both parties, could only be entered into by the Company by being signed by three Directors and countersigned by the Secretary, and therefore could only be altered in the same manner. The condition is precedent to the plaintiffs' right to recover—

Boydell v. *Drummond*, 11 East., 142
Dobson v. *Collis*, 1 H & N., 81
Birch v. *Earl of Liverpool*, 9 B. & C., 392
Goss v. *Lord Nugent*, 5 B. & A., 58
Simpson v. *Accidental Insurance Company*, 26 L.J.C.P., 289
Carpenter v. *Blanford*, 8 B. & C., 575
Stowell v. *Robinson*, 3 Bing. N.C., 928, 5 Scott, 196
Stead v. *Dawber*, 10 A. & E., 57
Roper v. *Lendon*, 5 Jur., N.S., 491
Mason v. *Harvey*, 8 Ex., 819

The jury could not have reasonably come to the conclusion that a sufficient account had been delivered—

Fitch v. *Liverpool and London Fire and Life Insurance Company*, 1 N.S.W. Repts., 89.

A rule *nisi* being granted,

20 July—

Ingleby and *Way* showed cause.—The delivery of the particulars

within fifteen days was not a condition precedent. The wording of the condition differed materially from any on which decisions were reported in the English Law-books. The claim was to give notice of the loss, then the person was to send in particulars of his claim within fifteen days; but, at any rate, before the expiration of three months, when, if he had not done so, the claim became wholly invalidated. The former part as to fifteen days was merely an office regulation. The document was a deed-poll, and the condition being inserted entirely on behalf of the Company, the words were to be taken, according to the common rule, most strongly against themselves. The cases cited were not authorities on behalf of the plaintiff for two reasons; because they were not founded upon similar conditions, and also because they were decisions in demurrer, which depended in many instances upon the state of facts.

Roper v. *Lindon*, 5 Jur., N.S., 491
Mason v. *Harvey*, 8 Ex., 819

show this.

Ward v. *Day*, 4 B. & S., 356
Jones v. *Barkly*, 2 Douglas, 684
Addison on Contracts, 946

show that a man can always dispense with the performance of a condition in his own favour. In enquiring whether there had been any waiver, it was necessary to refer to the letter of the 23rd December from the defendant's Secretary, to the plaintiff, which said—"Enclosed find proper claim for stock and fixtures, which please fill out and return at once." It was upon that the whole correspondence and the action arose, and that showed that the Company considered that the furnishing of particulars within fifteen days was not a condition, but merely an office regulation; but if the Court thought it was, then there was a waiver of such condition, and the letter of the 23rd December was evidence of such a waiver. The next letter, dated January 13, 1870, requested Mr. Warren to furnish as soon as possible a detailed statement of the goods destroyed, or if he could not do that, his stock-sheets and particulars of all goods taken in and out. That was written

after receipt of the balance-sheet, which the plaintiff sent in. The defendants had received that. The letter was proof that they accepted it, in accordance with the condition, and then required a detailed statement, or, if that could not be supplied, the stock-sheets and particulars of all goods taken in or out. That was an admission which, by the doctrine of estoppel, prevented the Company from saying that the account sent in on the 30th December was not an account sent in within fifteen days. The next was a letter from Messrs. Stow, Bruce, & Ayers, on February 16, repeating what their clients had already stated to Mr. Warren, that, before considering his claim, they required his books and vouchers of his purchases. Forfeiture may be waived at any time. (GWYNNE, J.—There cannot be a waiver after breach, though the particulars accepted afterwards may be pleaded as accord and satisfaction.) The Court, if it saw it to be necessary, would amend the record by insertiug such a plea. But the rule referred to did not apply, because the reason for it failed. The principle on which it was held that there could not be a waiver of a condition after breach of contract was that a new right of action would have arisen, and no right of action here ever arose. On the point, that a condition of forfeiture was voidable at any time, the cases cited establish the principle that a stipulation of the kind in question, that the contract should be void, meant void at the election of the party in whose favour the condition was made. The words of this condition, "or if no claim be made within three months after the fire, or if made and rejected, shall not be insisted on within three months," clearly implied that when a claim was made it did not become void, except at the option of the assurers—

Rippinghall v. *Lloyd*, 5 B. & Ad., 742.

It was competent for them at any time, until they had exercised their election, to give a dispensation as to time—

West v. *Blakeway*, 2 M. & G., 729.

What was required under the policy was that, in the first place, the party sustaining any loss or damage was to give notice forthwith; then he was to send in an account, stating the loss or damage

as particularly as the nature of the case would allow; proof of the truth of that was to be made by the books and declaration. There was a judicial decision by Baron Pollock, in *Mason* v. *Harvey*, that the meaning of such a condition was that the assured would within a convenient time after the loss produce to the Company something which would enable them to form a judgment as to whether or no he sustained such a loss. That was also pointed out to be the meaning in the New South Wales case. Then how would that be attained? By the same calculation precisely as the plaintiff had placed the defendants in possession of. He showed that it was impossible for him, from memory or any other means, to give a list of the articles destroyed, and he had recourse to the only other mode of ascertaining what his loss was. He had an account of what goods were in his possession some six months previous to the fire, and then he ascertained the additions that were made since, his cash takings, and what was left, and that was the only reliable means by which an account of the loss or damage could be obtained. There was evidence to go to the jury of the delivery of an account, which was not objected to. The condition was not a condition, but only directory, with respect to the fifteen days; and there was ample evidence that the condition was waived before breach, or that being a forfeiture, it was competent for the assurers to waive it at any time—

Behn v. *Burness*, 32 L.J., Q.B., 204
Millward v. *Ingram*, 1 and 2 Modern Repts., 206 and 43
Bacon's Abridgment, Release, *a.* 1.

Stow, Q.C., and *Boucaut*, in reply.—The declaration set out a policy of insurance, whereby, in consideration of a premium paid, the defendants agreed to indemnify the plaintiff against loss or damage by fire, subject to certain conditions, and on the trial he averred general performance. The defendants pleaded non-performance of the condition to deliver particulars within fifteen days, and upon that issue was joined. The declaration was amended, and it was alleged, as it now stood, that before breach or rather before the time fixed for the delivery of the particulars, there was a waiver that the defendants dispensed with the

condition. To that the defendants answered that there was no dispensation before the time for the performance of the condition, and it was on those pleadings that the case must be decided and not left at large, as it had been in the arguments on the part of the plaintiff. The learned Chief Justice directed the jury that there was evidence of waiver within the fifteen days, and that in considering that question they might use the evidence of what took place after the fifteen days, and that there was evidence of the performance of the contract according to the 11th condition. The evidence showed that within the fifteen days there were two letters sent by the plaintiff to the defendants. One, that of the 9th December, was only a notice that the property insured had been totally destroyed. The other, dated the 20th December, and received on the 22nd, claimed for insurance on stock, £600; fixtures and fittings, £35; dwelling-house, £600; and wholesale store, £515. That was a claim in terms of the policy itself, but did not profess to be a compliance with the condition, which required that particulars should be delivered. Nor did the reply which was sent on the 23rd December assume to accept it as a compliance. It told the plaintiff that he had violated the policy conditions by having used the store for other purposes than those agreed; and the last clause, which was the most important, was "enclosed find proper form of claim for stock and fixtures, which please fill out." That was more than a statutory declaration. It was a statutory declaration and a schedule. Then with regard to conversations, there was evidence that Mr. Meyer said that the claim would not be paid without full particulars, and that the claim must be made within fifteen days. The evidence of Mr. Rischbieth was to the same effect. Those being the facts of the case so far, they had to consider, first, whether or not this was a condition as to the fifteen days. As to the distinction between a condition and a stipulation, see

Worsley v. *Wood*, 6 T.R., 718.

Assuming it to be a condition, then, what was the meaning of it? The Court could not give it the construction they were asked to do by the plaintiff without striking out the words "fifteen days" altogether. But if there were words of different meanings, the

rule was decided—to reject that which was inconsistent with the intention of the parties in order that their object might be secured. What was the intention here? That within fifteen days an account was to be delivered. The Company had sixty days to pay. How necessary, then, was it that they should have this information, to afford them the means of arriving at a conclusion whether the claim was a fair one or not before they paid the money. If the fifteen days were not in, a man could put in his claim and issue a writ immediately. It was the very essence of the contract that this should be performed. Sending in particulars of the loss would not necessarily be sending in a claim; and the meaning of the condition is, that if after complying with the requirements as to notice and particulars he did not within three months complete his claim, he should not recover. There might be particulars sent in without a claim, or a claim without particulars. Then at what time and how could such a condition be waived? Where the right to recover a sum of money or damages depended on something to be performed by the claimant, that might at any time be waived before breach even by parol, and without any consideration; and so far as any past gone inchoate right was concerned, there could be no dispensation. Therefore, the continuation of a correspondence upon the subject of this loss after breach of the condition would not in any way benefit the assured or prejudice the assurers so far as the past gone loss was concerned—

Turnbull v. *Wolf*, 7 L.T., N.S.
Rimmon v. *Lloyd*, 5 B. & A., 742.

There was no evidence which should have been left to the jury of any dispensation on which it was competent for them to find a verdict for the plaintiff—there was no evidence of waiver before breach. In respect to the sufficiency of the account furnished by the plaintiff, his evidence elicited in cross-examination showed he could describe the kind, if not the quantity of the goods. As to the particulars, see also

Gibben v. *McMullen*, L.R., 2 P.C., 339.

Cur. ad. vult

16 December—

The judgment of the Court was delivered as follows by HANSON, C.J. —This was an action on a policy of insurance, and the question was whether the condition for the delivery of particulars within a certain time was a condition precedent; whether it had been waived, and, if so, to what extent; and whether, assuming it to have been waived as far as the question of time was concerned, it had been so substantially complied with as to entitle the plaintiff to recover. We are of opinion, upon consideration, that the delivery of particulars was a condition precedent—that it was waived in point of time, but only in point of time. Without expressing any positive opinion whether the particulars that were delivered could in any circumstances be a compliance with the conditions, we think there ought to be a new trial in order that a jury may express an opinion on the matter. There will, therefore, be a new trial; costs to abide the event.

Way asked that the new trial should be confined to that one point, so as to save the expense of reopening others upon which there was really no question. He cited—

Fiech v. *Liverpool and London Insurance Company*,
1 N.S.W. Repts., 111,

as an authority for such a course.

THE COURT declined to make any such limitation.

Rule absolute.

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TO THE PRINCIPAL MATTERS.

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